

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 30.10.2019

CORAM :

THE HONOURABLE DR.JUSTICE ANITA SUMANTH

W.P.No.8124 of 2013

and

M.P.No.1 of 2013

M/s.Usha International Ltd.

Represented by its Chief Operating Officer,
Plot No.15, Institutional Area,
Sector 32, Gurgaon-122001
Haryana.

.... Petitioner

Vs.

1.Customs & Central Excise Settlement Commission
Additional Bench, II Floor,
Narmada Block, Customs House,
60, Rajaji Salai,
Chennai-600 001.

2.The Commissioner of Customs (Exports),
Customs House,
Chennai-600 001.

... Respondents

Prayer: Writ Petition filed under Article 226 of the Constitution of India, for the issuance of Writ of Certiorarified Mandamus, calling for the records relating to the impugned order no.1/2013-Cus dated 20.02.2013 passed by the 1st Respondent, quash the same and consequently direct the 1st Respondent to recall and rehear the application filed by the Petitioner, for settlement under Section 127B of the Customs Act, 1962 by providing the Petitioner a reasonable opportunity of hearing.

For Petitioner : Mr.R.Parthasarathy

For Respondents : Mr.V.Sundareswaran

Senior Panel Counsel

ORDER

The petitioner had filed an application for settlement in terms of Section 127B of the Customs Act, 1962 (in short 'Act'). The application was received by the Settlement Commission (in

short Commission/SC) and numbered. A notice was issued on 07.02.2013 prior to listing of the application in terms of Section 127C(1) of the Act for admission/hearing thereof, raising various queries for response by the petitioner. One of the queries raised related to whether there was any case pending in the Appellate Tribunal or Court which would act as a bar to maintainability of the application in terms of the second proviso to Section 127B.

2.The petitioner filed a reply dated 15.02.2013 reiterating that the application was maintainable and praying that it may be proceeded with on merits, specifically reiterating at para-11 that there was no case pertaining to the show cause notice at issue, pending in the CESTAT or before any Court.

3.Notwithstanding the reply filed, the impugned order has come to be passed even without hearing the petitioner, simply rejecting the application as non-maintainable, invoking the second proviso to Section 127B of the Act.

4.Heard learned counsel appearing for the petitioner and learned Additional Government Pleader for the respondent.

5.Section 127B of the Act, including the second proviso thereto, reads as follows:

'Section 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 :

PROVIDED that no such application shall be made unless,-

. . . . :

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 has been committed :

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6. Section 127B relates to an application for settlement of cases and sets out three bars for entertaining of an application by the Commission, the second, and the one relevant to this case, being the pendency of any cases before the Appellate Tribunal or any Court.

7. According to learned counsel for the petitioner, the application of the second proviso is only to those cases which relate to an assessment of duty and interest, pending either before the Customs Central Excise and Service Tax Appellate Tribunal (CESTAT) or any other Court. Thus, the pendency of proceedings for prosecution, should not, according to him, be construed as a bar to the maintainability of an application for settlement.

8. According to the learned counsel for the respondent, the proviso should be read literally so as to cover both cases of assessment as well as of prosecution.

9. The learned counsel for the respondent also tentatively states that there has been non-disclosure of pendency of proceedings for prosecution before the Special CBI Court, before the Commission. However, at paragraph-20 of the settlement application, the petitioner has made specific reference to the prosecution launched against the petitioner by the Central Bureau of Investigation in Special CBI Court, setting out various details in connection with the same. Thus there is no merit in the argument that the petitioner has approached the settlement commission without making a full and true disclosure in this regard. This argument is rejected.

10. On the legality of the contention itself, the petitioner relies on a decision of the Co-ordinate Bench of the Settlement Commission, Bombay in the case of Shri Agarwal Trading Company (Appeal No.F.No.SC/WZ/CUS/38/Agarwal/2000, dated 19.2.2001), that had considered the admissibility of an application in the light of the bar contained in the first proviso to Section 127B at paragraphs-8 and 9 thereof, as follows:

'8. The terms "case is defined in Section 127A(b) of the Customs Act, 1962. "Case" means any proceeding

under this Act or any other Act for the levy, assessment and collection of Customs duty, or any proceeding by way of appeal or a revision in connection with the levy, assessment or collection, which may be pending before the proper officer or (sic) Central Government on the date on which an application under sub-section (1) of Section 127B is made. In other words case relates to a proceeding and the proceeding is for the purposes of levy, assessment and collection of Customs duty. The second proviso to Section 127B(1) bars any application to be entertained by the Settlement Commission in cases which are pending with the Appellate Tribunal or any Court. Cases which are pending in this context is to be entertained as a proceedings for the levy, assessment and collection of Customs duty lying with Appellate Tribunal or any Court. In other words an application can be entertained by the Settlement Commission under Section 127B so long as there is no proceedings for the levy, assessment and collection pending with the Appellate Tribunal or any Court. That is to say that even if the proceedings for the prosecution have been instituted before the date of receipt of the application under Section 127B, yet the application can be entertained by the Settlement Commission.

9.A reading of Section 127H of Customs Act, 1962 would support the above arguments. Section 127H of Customs Act, 1962 gives the power to the Settlement Commission to grant immunity from prosecution for any offence under this Act or the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and such immunity may be either in whole or in part from the imposition of any penalty, fine and interest under this Act (Customs Act, 1962), with respect to the case covered by the settlement. This granting of immunity however, is left to the discretion of the Settlement Commission depending upon certain factors discussed in Section 127H. The Settlement Commission may or may not grant immunity from prosecution, penalty, fine and interest. The power to grant immunity from prosecution is relating to any offence committed under the Customs Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force. However, the power to grant immunity either wholly or in part from the imposition of any penalty, fine and interest is with reference to Customs Act only. The offence discussed in this section means an offence relating to

the case covered by the settlement. The proviso to sub-section (1) of Section 127H ibid reads as below:

Provided that no such immunity shall be granted by the Settlement Commission in cases where the proceedings for prosecution for any such offence have been initiated before the date of receipt of the application under Section 127B.'

11.The Bench has proceeded to entertain the application based on the interpretation that the word 'case' utilised in the proviso should assume the same meaning as the definition of the word under the Customs Act 1962 which means 'any proceeding under this act or any other act for the levy, assessment and collection of customs duty' as contra distinguished from proceedings for prosecution. Further, the provisions of Section 127H of the Act empower the Commission to grant immunity to prosecution under either the Customs Act, the IPC or any other Central Act, in such cases where prosecution has not been instituted before the date of receipt of the Application for settlement by the Commission.

12.I prima facie agree with the rationale of the aforesaid order. Had the commission issued notice to the petitioner prior to hearing the matter, it would perhaps have been persuaded to adopt a reasoning similar to that of the Co-ordinate Bench, as above. However this has not been done.

13.The impugned order, in the light of the discussion above, is set aside. The petitioner will appear before the respondent on Thursday, the 14th of November 2019 at 10.30 a.m. No further notice need be issued in this regard. An order shall be passed by the Settlement Commission after hearing the petitioner on the question of maintainability, further proceedings being consequent upon the result of such order. It is made clear that none of the observations made in this order shall stand in the way of the Settlement Commission deciding the legal issue of maintainability, independently and in accordance with law.

14.This writ petition is allowed. No costs. Consequently, connected miscellaneous petition is closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

To

1.The Customs & Central Excise Settlement Commission
Additional Bench, II Floor,
Narmada Block, Customs House,
60, Rajaji Salai,
Chennai-600 001.

2.The Commissioner of Customs (Exports),
Customs House,
Chennai-600 001.

+1 cc to M/s.Lakshmi Kumaran,Advocate Sr.No. 89932
+1 cc to M/s.V.Sundareswaran, Advocate Sr.No.89933

AKM/06.11.19/5P-5C /

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