$~36

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

<u>Date of Order: January 16, 2019</u>

\+ W.P.(C) 8881/2015

THE COMMISSIONER OF CUSTOMS ..... Petitioner

Through: Mr.Harpreet Singh, Senior Standing Counsel with Ms.Suhani Mathur, Advocate

versus

JYOTSNA CHIKERSAL & ANR. ..... Respondent

Through: Ms. Alisha Panda, Mr. Aadil Singh Boparai, Advocates

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

<u>O R D E R</u>

%

<u>S. RAVINDRA BHAT, J. (ORAL)</u>

1. The Customs Authorities have filed these proceedings questioning the decision of the Settlement Commission made upon an application filed by the respondent. It is contended that the Settlement Commission could not have, by virtue of third proviso to Section 127B [read with Section 123(2)] of the Customs Act, lawfully entertained the application and proceeded to pass orders settling the issues urged.

2. The respondent, who is a former United Nations official, arrived at IGI Airport, Delhi, on 04.05.2014; carrying 6 gold bars weighing 1832.4 gms, valued at Rs. 45,45,222/-. She did not declare the gold either at the stage of clearing the customs area or disclose the information in the disembarkation slip. Upon search, the gold was

detected and seized from her person. The show cause notice was issued on 22.10.2014. On 13.01.2015, the respondent moved the Settlement application which was finally disposed of and the matter settled by recording a final settlement order on 05.06.2015.

3. The Union of India through the Customs Department urges that Section 123(1) which provides for shifting the burden of proof where the goods are seized in the reasonable belief that they have been smuggled, would apply to gold, watches and any other class of goods which the Central Government notifies. It is urged that this is apparent by virtue of Section 123(2), and the third proviso of Section 123B operates as a clear bar to the Settlement Commission's jurisdiction. Learned counsel for the petitioner/Customs authorities relies upon the decision of the Division Bench of this court in *Additional Commissioner of Customs vs. Ram Niwas Verma*, 2015 (323) ELT 424 (Del), especially the following extract:

> *"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.

8. The learned counsel for the respondent sought to draw some support from a decision of this Court in the case of Commissioner of Customs v. Ashok Kumar Jain: 2013 (292) ELT 32 (Del) as also a subsequent decision of another Division Bench of this Court in Komal Jain v. Union of India and Another: 2014 (304) ELT 675 (Del). In Ashok Kumar Jain (supra), the issue of Section 123 has not been considered at all. Insofar as the decision in Komal Jain (supra) is concerned, the Division Bench itself, in paragraph 21, observed that the issue with regard to the applicability of Section 123 of the Act by way of the third proviso to Section 127B was left open and it was for the Settlement Commission to examine the same, if such a point was raised, in accordance with law. In the present case, we find that the point with regard to the third proviso to Section 127B(1) read with Section 123 of the said Act had been specifically raised by the Revenue and the same has been considered by the Settlement Commission and has been rejected. We have already indicated above that the rejection by the Settlement Commission is not in accordance with law. A plain reading of the provisions clearly indicates 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. We may point out that there is no question of examining the provisions of Section 123(1) as also its applicability because that is not the context of the third proviso to Section 127B(1). The said proviso only makes a reference to the goods to which Section 123 applies and not to Section 123 itself. We have already made it clear that the goods to which Section 123 applies includes gold, as specifically indicated in Section 123 (2) of the said Act."

4. Likewise the decision in *Commissioner of Customs vs. Avinash Dawar*, 2015 (326) ELT 639 (Del) is relied upon. In that decision too, the judgment of *Ram Niwas Verma* (supra) was reiterated and applied.

5. The respondent – assessee urged that the Settlement Commission proceeded to pass final orders, allowing the application, having regard to the jurisdiction it possesses and by relying upon its Special Bench order in Re: *Idris Y. Porbandarwala,* 2005 (186) ELT 356, which was also cited in the judgment in *Commissioner of Customs vs. Ashok Kumar Jain*, 2013 (292) ELT 32. It is pointed out that in the facts and circumstances of that case the ground was that a quantity of the watches was sought to be smuggled and that the court had upheld the orders of the Settlement Commission.

6. Section 123 to the extent it is relevant, reads as follows:

> ***Section 123 in the Customs Act, 1962***
>
> *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. Chapter XIVA of the Customs Act contains the mechanism for settlement of cases. By virtue of Section 127A, the Customs, Central Excise and Service Tax Settlement Commission constituted under the Central Excise Act is designated as the Settlement Commission under the Customs Act also. Section 127B prescribes what ought to be the contents of the application and the procedure therefor. To the extent relevant, it is reproduced below:

Section 127B in the Customs Act, 1962

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[254] [or otherwise] and such application shall be disposed of in the manner hereinafter provided: Provided that no such application shall be made unless,—

(a) the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of such goods, as the case may be, and in relation to such bill of entry or shipping bill, a show cause notice has been issued to him by the proper officer;

(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 28AB:

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) Notwithstanding anything contained in sub-section (1), where an application was made under sub-section (1) before the 1st day of June, 2007 but an order under sub section (1) of section 127C has not been made before the said date, the applicant shall within a period of thirty days from the 1st day of June, 2007 pay the accepted duty liability failing which his application shall be liable to be rejected.]

(2) Where any dutiable goods, books of account, other documents or any sale proceeds of the goods have been seized under section 110, the applicant shall not be entitled to make an application under sub-section (1) before the expiry of one hundred and eighty days from the date of the seizure.

(3) *Every application made under sub-section (1) shall be accompanied by such fees as may be specified by rules.*

(4) *An application made under sub-section (1) shall not be allowed to be withdrawn by the applicant. "(1) Any importer, exporter or any other person (hereinafter in this Chapter referred to as the applicant) may, at any stage of a case relating to him, make an application 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 or otherwise of goods, to the Settlement Commission to have the case settled and such application shall be disposed of in the manner hereinafter provided: Provided that no such application shall be made unless—*

(a) *the applicant has filed a bill of entry, or a shipping bill, in respect of import or export of goods, as the case may be, and in relation to such bill of entry or shipping bill or a show cause notice has been issued to him by the proper officer;*

(b) *the additional amount of duty accepted by the applicant in his application exceeds two lakh rupees: 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).".*

8. The decision in *Ram Niwas Verma* (supra) has analysed various judgments including the previous judgment in *Ashok Kumar Jain* (supra). The Court held that by virtue of Section 123(2), jurisdiction of the Commission is barred on account of the third proviso to Section 127B(1), in cases involving or concerning smuggling of gold or watches. This decision was carried in appeal by special leave to the Supreme Court; the Special Leave Petition was rejected by order dated 02.11.2015 [reported as *Ram Niwas Verma vs. Additional Commissioner of Customs,* 2016 (331) ELT A 129 (SC)].

9. The plain reading of *Ashok Kumar Jain* (supra) that was relied upon by the respondent assessee, shows that the Court had not considered the impact of Section 123(2) upon the jurisdiction of the Settlement Commission in the light of the third proviso to Section 127B. A conjoint reading of these two provisions clearly bears out that the jurisdiction of the Commission to settle cases involving goods referred to in Section 123(2) is excluded. In these circumstances, the reliance placed by the Division Bench upon Re: *Idris Y. Porbandarwala* (supra), in our opinion, was unsubstantial. Clearly, the law was correctly interpreted and applied in *Ram Niwas Verma* (supra) and *Avinash Dawar* (supra). The decision in *Ashok Kumar*

Jain (supra) overlooked the provision and therefore, cannot be treated as binding precedent.

10. For the above reasons, this court is of the opinion that the impugned order cannot be sustained which is hereby set aside.

11. The matter is remitted to the concerned Adjudicating Officer, who shall proceed further and issue notice in the proceedings to be held thereunder.

12. The writ petition is allowed in the aforesaid terms.

S. RAVINDRA BHAT, J

PRATEEK JALAN, J

JANUARY 16, 2019
pkb