Ajay /Amberkar

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 9069 OF 2021
WITH
INTERIM APPLICATION NO. 4125 OF 2021

1. Mehta Infocomm,
   Mehta House, Plot No.AF/3,
   Cama Industrial Estate,
   Off W.E. Highway, Goregaon (E),
   Mumbai.

2. Akash Tori Infocom Service Pvt. Ltd.
   Uttarayan, J.P. Avenue, Sagarbhanga,
   Durgapur, West Bengal - 713211.

3. Rainbow Digitech Pvt. Ltd.,
   Bhawati Gat No.496/1/A,
   Plot No.1, Floor No.2, Vani,
   Dindori, Nasik - 422215.

4. Jignesh Mehta,
   601, Gala Residency,
   Haji Bapu Road, Malad (E),
   Mumbai - 400097. .. Petitioners

Versus

1. Additional Director General (Adjudication),
   Directorate of Revenue Intelligence,
   2nd Floor, Old Building,
   New Custom House, Ballard Estate,
   Mumbai - 400001.

2. Director General,
   Directorate of Revenue Intelligence,
   7th Floor, D Block, I.P. Estate,
   New Delhi - 110001.

3. Commissioner of Customs,
   Nhava Sheva - V,
   Jawaharlal Nehru Customs House,
   Tal. Uran, Raigad - 400707.

4. Principal Commissioner of Customs,
   In-charge of Gr.VA, (Port), Strand Road,
   Custom House, Kolkata.

5. Pr. Commissioner of Customs,
   Air Cargo Complex, New Custom House,
   New Delhi - 110037.

6. Commissioner of Customs,
   ICD, Patparganj, Delhi - 110096.

7. The Union of India,
   Through Government Pleader,
   High Court, Mumbai having his office
   At Aayakr Bhawan, M.K. Road,
   Mumbai - 400020. .. Respondents

....

- Mr. Devesh Tripathi a/w. Pankti Shah, Krishnaprasad Mundayoor for the Applicants.
- Mr. Jitendra B. Mishra a/w. Dhananjay B. Deshmukh for Respondent Nos.1 and 2.

....

CORAM : DIPANKAR DATTA, CJ &
MILIND N. JADHAV, J.

DATE : 17th DECEMBER, 2021

P.C. (MILIND N. JADHAV, J.):

1. This order shall dispose of the Writ Petition and Interim Application No. 4125 of 2021 filed by the Petitioners.

2. By the present petition, the Petitioners have challenged the Order-in-Original No.129 SA(129) ADG (ADJ)/DRI, MUMBAI/2019-20 dated 24.03.2020 passed by the Respondent No.1 - Additional Director General (Adjudication), Directorate of Revenue Intelligence, Mumbai (for short "**Respondent No. 1**") redetermining the declared assessable value, levying differential duty and, penalty in respect of the Petitioners respectively.

3. Pursuant to the filing of the Writ Petition, the Dy. Commissioner of Customs, SIIB (Import), ACC, Mumbai-III has issued a communication dated 29/10/2021 (received by the Petitioners on 06.11.2021) to the Petitioners, *inter alia,* intimating the Petitioners to apply before the jurisdictional Chief Commissioner of Customs for compounding of their offences under the provisions of the Customs (Compounding of Offences) Rules 2005 (for short **"the said Rules"**) in order to get immunity from prosecution subject to payment of compounding amount as prescribed under Rule 5 in terms of grant of order under Rule 4(3) of the said Rules. Petitioners have impugned the above communication in Interim Application No. 4125 of 2021 and pressed the present Petition.

4. It will be apposite to briefly state the relevant facts to adjudicate the *lis* raised in the petition.

4.1. The impugned order is a composite order, though common on facts, however, gives separate reasons for five entities namely Mehta Infocom, Akash Tori Infocom Service Pvt Ltd , Rainbow Digitech Pvt Ltd, Jignesh Metha and M/s Agile Broadband Pvt Ltd.

M/s. Agile Broadband Pvt Ltd is not before us. The remaining four entities are Petitioner Nos. 1 to 4.

4.2. Petitioner No.1 is a partnership firm whereas Petitioner Nos.2 and 3 are Private Limited Companies. Petitioner No.4 is the partner of Petitioner No. 1 Firm and authorized representative of Petitioner Nos. 2 and 3. All Petitioners are engaged in the import of Set Top Boxes (STB) embedded with Conditional Access System (CAS) either imported directly or purchased on high sea sale basis.

4.3. Based on information received by the Revenue Department and investigation conducted in relation to import of CAS embedded STBs, common show cause notice dated 27.03.2019 was issued by the Principal Director General, Directorate of Revenue Intelligence, Mumbai Zonal Unit, Mumbai to the Petitioners, *inter alia*, on the ground of non-declaration of licence fee paid or payable to the CAS provider per STB unit; suppression of actual value of STB unit; fabrication of invoices to undervalue the unit price of the STB; non declaration of retail price in terms of the applicable provisions and wrongful availment of exemption under notification dated 17.03.2012 resulting in non-payment of Special Additional Duty (SAD).

4.4. Respondent No.1 was appointed as common adjudicating authority vide Notification No.17 of 2019 dated 22.04.2019.

4.5. On 09.07.2019, Respondent No.1 communicated the date of hearing to the Petitioners.

4.6. By letter dated 25.07.2019 Petitioner No.1 informed the Respondent No.1 that a show cause notice on the similar issue was received by the Petitioner from the Settlement Commission and the Petitioner was desirous of filing a consolidated application before the Settlement Commission.

4.7. On 16.10.2019 i.e on the hearing date, Petitioners requested the Respondent No. 1 for an adjournment on the ground that they were awaiting receipt of the last show cause notice from the Settlement Commission and were desirous of approaching the Commission by filing a consolidated Settlement Application.

4.8. On 16.10.2009 the Respondent No. 1 issued a notice to the Petitioner No. 1 to provide the necessary documents pertaining to filing of the appeal before the Settlement Commission and fixed the next date of hearing on 08.11.2019.

4.9. On 04.11.2009, Petitioner No. 4 on behalf of Petitioner No. 1 sought an adjournment for 60 days to enable the Petitioners to appraoch the Settlement Commission.

4.10. Hearing was fixed on 30.01.2020 and 13.02.2020. Thereafter on 12.02.2020 and 29.02.2020, Petitioners by separate letters sought time for 30 days to enable the Petitioners to approach the Settlement Commission.

4.11. Finally on 13.02.2020 personal hearing was given to the Petitioners and submissions were made before the Respondent No.1 adjudicating authority by the Petitioners' representative.

4.12. It is asserted in the petition that some time on 24.03.2020 the Petitioners had prepared Demand Drafts for the differential duty, penalty and interest and were in the process of submitting the same to the authorities, but due to the Covid-19 lockdown the Petitioners could not submit the same.

4.13. In the meanwhile, Petitioners addressed e-mail dated 11.03.2020 to the Respondent No.1 adjudicating authority for seeking some more time to enable the Petitioners to file the Settlement Application before the Settlement Commission.

4.14. Respondent No.1 passed the impugned order on 24.03.2020, *inter alia*, holding that the Petitioners' were liable for payment of differential duty, penalty and interest.

4.15. Hence the present Petition.

5. Mr. Tripathi, learned counsel appearing for the Petitioners submits that by virtue of the impugned order, the Petitioners have been denied an opportunity to approach the Settlement Commission and offer a settlement proposal. It is argued that the impugned order is passed in gross violation of the principles of natural justice despite the adjudicating authority being duly informed in writing of the intent of the Petitioners to approach the Settlement Commission; notices issued to the Petitioners mention that the Petitioners had an option available for settlement of their cases in terms of the provisions of Chapter XIVA of the Customs Act, 1962 which gives the opportunity to the Petitioners to approach the Settlement Commission and that impugned order is contrary to the fundamental principles of natural justice. Mr. Tripathi therefore prays for setting aside and quashing of the impugned order dated 24.03.2020. He submitted that the Petitioners have grave apprehension that the Revenue Department shall launch prosecution against the Petitioners and therefore this Court should intervene and stay any coercive action against the

Petitioners. He further submitted that the Petitioner No. 1 has voluntarily paid an amount of Rs. 1,00,00,000.00 during the period of investigation and the other Petitioners had prepared Demand Drafts of the differential duty, penalty and interest to be given to the Settlement Commission but on account of Covid-19, the said demand drafts could not be deposited. He submitted that the Petitioners' bonafides are evident and thus, coercive proceedings against the Petitioners be prevented pursuant to the intimation dated 29.10.2021.

6. Mr. J.B. Mishra, learned counsel appearing for the Respondent Nos. 1 and 2 has drawn our attention to the impugned order dated 24.03.2020 and contended that the said order is a reasoned order in respect of each of the Petitioners and their respective dealings on several counts as enumerated in paragraph Nos. 4.12.1 to 4.12.4 of the order. He submits that though the impugned order is a composite order, the issue and reasons in respect of each of the four Petitioners has been considered and determined independently in conjunction with the role of the Petitioner No. 4 rendering them liable to differential duty, penalty and interest. He submitted that the Order-in-Original dated 24.03.2020 is a detailed reasoned order in respect of each of the Petitioners' case and the only grievance made by the Petitioners in the Petition is that the Petitioners were awaiting the receipt of a fresh show-cause-notice pursuant to which the Petitioners desired to approach the Settlement Commission for settlement of their liabilities; however the same had not been done till date; the Petitioners are guilty of gross delay and laches in not approaching the Settlement Commission despite opportunity and time being given to the Petitioners. He, therefore, submitted that the impugned order cannot be faulted with as there is no challenge to the impugned order on merits by the Petitioners. Hence, he has prayed for dismissal of the Petition.

7. We have perused the pleadings and the Order-in-Original dated 24.03.2020. Submissions of the parties have been considered, which are on pleaded lines.

8. We may state that on a reading of the Order-in-Original dated 24.03.2020 annexed at Exhibit 'D' to the Petition, it cannot be argued that the said order can be termed as an exparte order as alleged by the Petitioners. The Petitioners were duly issued show-cause-notices all dated 27.03.2019 pursuant to which personal hearing in the case was fixed on 26.07.2019, 08.11.2019 and 13.02.2020 in respect of all the Petitioners before us.

8.1 Paragraph Nos. 2.0, 2.1, 2.2, 2.3 and 2.4 of the impugned Order-in-Original are relevant and read thus:

"2.0 **Personal Hearing (PH)**

2.1 PH in the matter was fixed on 26.07.2019, 08.11.2019 and 13.02.2020 in respect of all the five Noticees M/s. Mehta Infocomm, M/s. Agile Broadband Pvt. Ltd, M/s. Akash Tori Infocom Services Pvt. Ltd, M/s. Rainbow Digitech Pvt. Ltd and Shri Jignesh Mehta. Vide the said PH letters, Noticee were called to attend the PH before me in order to conclude the adjudication proceeding but all the Noticees failed to attend the PH citing common ground of approaching the Settlement Commission vide their various letters and email. Details of PH Letters Partywise are as under;

Sr. No.	Name of Noticess	Date of PH Letter	Schedule of PH	Remark
1	Shri. Jignesh Mehta & M/s. Mehta Infocomm	08.07.2019 16.10.2019 30.01.2020	26.07.2019 08.11.2019 13.02.2020	Not attending citing approaching Settlement Commission. Informed vide letters dated 25.07.2019, 04.11.2019 and also through mail. Further they were represented by Ms. Ami Mehta on 13.02.2020, for limited purpose of intimating regarding filing application before Settlement Commission wherein she stated approaching Settlement Commission. Vide mail dated 11 March 2020 reiterated the same.
2	M/s. Agile Brobdand Pvt Ltd	08.07.2019 16.10.2019 30.01.2020	26.07.2019 08.11.2019 13.02.2020	Letter of PH dated 09.07.2019 returned due to insufficient address, In response to PH letter dated 16.10.2019, they informed vide mail dated 07.11.2019 regarding approaching Settlement Commission, Further they were reprsented by Ms. Ami Mehta on 13.02.2020, for limited purpose of intimating regarding filing application before Settlement Commission wherein she stated approaching Settlement Commission. Vide mail dated 03.03.2020, they reiterated the same.
3	Akash Tori Infocom Services Pvt Ltd	08.07.2019 16.10.2019 30.01.2020	26.07.2019 08.11.2019 13.02.2020	All three PH letters returned with remark insufficient address. Final PH letter served through Notice Board. However, they were represented though Ms. Ami Mehta on 13.02.2020, who informed approaching Settlement Commission. Again vide email dated 11.03.2020 they reiterated the same.
4	M/s. Rainbow Digitech Pvt Ltd	08.07.2019 16.10.2019 30.01.2020	26.07.2019 08.11.2019 13.02.2020	Vide letters dated 19.01.2019 informed approaching Settlement Commission and hence not attended PH. On 13.02.2020, PH was attended Ms. Ami Mehta on behalf of the said company for limited purpose of intimating regarding filing application before Settlement Commission. Vide mail dated 2.03.2020 and 11.03.2020, they reiterated the same.

2.2 With regard to PH dated 13.02.2020, PH was attended by Ms Ami Mehta (Senior Manager, Commercial) on behalf of all the aforesaid Noticees for limited purpose of intimating regarding filing application before Settlement Commission wherein she informed that all the Noticees were in process of filing application before Settlement

Commission and submitted that proof of acknowledgment would be submitted by them by 29th February. She was also informed that adjudication would be carried out by this Office without any further Notice, to which she agreed. She also submitted letters dated 12.02.2020 from all the Noticees wherein it was informed that they were in process of filing application before Settlement Commission.

2.3 On 29.02.2020, Ms Ami Mehta and Shri Jignesh Mehta approached this Office and requested that they would be requiring some more time for filing of application before Settlement Commission and accordingly sent mail and requested not to pass any order.

2.4 I find from the above that inspite of fixing of the Personal Hearing on three occasions as detailed in table above, none of the Noticees appeared. It is also evident from the records that PH letters were well served in case of all the Noticees except M/s Akash Tori Infocom Services Pvt. Ltd. Inspite of the receipt of PH letters by all the Noticee (except Akash Tori Infocom Services Pvt. Ltd.), none appeared for PH, however they kept stating that they were approaching Settlement Commission for settlement of the instant case, however till passing of this OIO, no such intimation regarding filing of application before Settlement Commission received by me. Final PH letters dated 30.01.2020 were issued to all the Noticees by this office fixing date of PH on 13.02.2020, proceedings of which is detailed in above para. PH on 13.02.2020 was attended by Ms. Ami Mehta on behalf of all the Noticee, wherein she has reiterated approaching Settlement Commission by all the Noticees. Subsequently various emails were received (as detailed in table in above para) from all the Noticees stating approaching Settlement Commission, which did not happen."

8.2. Before the Competent Authority, though hearing was fixed and the Petitioners had received notices for hearing, the Petitioners did not attend the hearing on certain dates on the pretext of approaching the Settlement Commission. That apart, it it seen that between 08.07.2019 and 29.02.2020, the Petitioners sought repeated adjournments to approach the Settlement Commission, however the Petitioners in fact never approached the Settlement Commission during the said period. In this backdrop, the Petitioners' principal relief in the Petition that the impugned Order-in-Original has been passed in violation of the principles of natural justice despite the Petitioners having been given several opportunities and the Petitioners choosing not to attend the hearings on the pretext of approaching the Settlement Commission and praying for adjournments clearly shows the malafide on the part of the Petitioners. Had the Petitioners even approached the Settlement Commission during the said period, the Petitioners' bonafides could have been appreciated. Instead, the Petitioners entered into correspondence with the Competent Authority seeking repeated adjournments on the ground that they were in the process of filing application before the Settlement Commission. It is seen that on 13.02.2020, the Petitioners' representative submitted that the Applications would be filed before the Settlement Commission and proof of acknowledgment would be submitted by the Petitioners by 29.02.2020. It is stated in the order that the Petitioners' representative was duly informed that on the adjourned date adjudication would be carried out to which she had agreed.

8.3. We are also at pains to observe that under the provisions of Section 28(9)(b) of the said Act, the proper offices have an obligation to determine the amount of duty or interest within a period of one year from the date of notice in respect of cases falling under Section 28(4) and considering this prescribed statutory obligation, the Competent Authority passed the Order-in-Original within the stipulated period of time as mandated which would have otherwise rendered the show-cause-notices as null and void. In fact from an overall reading of the list of dates and events narrated above, it appears that the Petitioners' intent was to frustrate the adjudication process and render the show cause notices futile. The intention to delay is therefore writ large on the face of the record and is attributable to the Petitioners' omission to prolong the hearing and on the other hand not approach the Settlement Commission.

8.4. That apart perusal of the intimation dated 29/10/2021 shows that the Petitioners have been given notice to make an application for compounding of the offence under Rule 3 of the said Rules before the jurisdictional Chief Commissioner of Customs in accordance with law. Paragraph Nos. 4, 5 and 7 of the said intimation are relevant and read thus:-

> "4. However, before launching of prosecution proceedings, it is relevant to mention that under Section 137(3) of Customs Act, 1962 read with the Customs (Compounding of Offences) Rules 2005, arrangement has been made to make an application for compounding of offence under Rule 3 of the Customs (Compounding of offences) Rules 2005 before jurisdictional Chief Commissioner of Customs, ACC, Zone-III, Mumbai subject to payment of Compounding amount as prescribed under Rule 5 in terms of grant of order under Rule 4(3) of the said Rules.
>
> 5. In view of the above provisions, it is also informed that before submission of application, you are also requested to pay duty, penalty and interest liable to be paid in terms of second proviso of Rule 4(3) of the said Rules.
>
> 6. .....
>
> 7. In view of the above, you are requested to inform to this

> office within 30 days from the receipt of this letter whether you intend to apply for compounding of offence under Customs (Compounding of Offence) Rules, 2005 in order to get immunity from prosecution or otherwise. In case no information is received from your side regarding option to exercise compounding of offence under the said Rules, this office will initiate prosecution proceedings against you."

8.5. The Petitioners have by the Interim Application filed on 24.11.2021 approached this Court on the apprehension that the office of the Dy. Commissioner of Customs, SIIB(Import), ACC, Mumbai-III is contemplating launching of prosecution against the Petitioners and therefore, the Petitioners require protection from this Court. We may mention that the Order-in-Orignal was passed on 24.03.2020 against the Petitioners. The Petitioners filed the Writ Petition on 26.12.2020. The Interim Application has been filed on 24.11.2021. There is no averment in the Interim Application that the Petitioners have approached the Settlement Commission and filed the consolidated Settlement Application between the period 24.03.2020 to 24.11.2021. Nothing prevented or precluded the Petitioners from approaching the Settlement Commission during the above period. In the Petition, the Petitioners have relied upon a decision of the Madras High Court in the case of **Thirumurugan Enterprises Vs. Addl. Commisisoner of C. Ex., Puducherry**[1] wherein the Petitioner's request to approach the Settlement Commission was considered and two weeks' time was granted to the Petitioners to approach the Settlement Commission. Even today, when the Petition is argued by the Petitioners, such a

1 2015(39) S.T.R. 563 (Mad)

request at this belated stage is not made by the Petitioners before us. However, looking to the conduct of the Petitioners, the ratio of the above case does not apply to the facts of the case at hand.

8.6. Be that as it may, we do not find any merit in the submissions made on behalf of the Petitioners that the Petitioners should be granted a stay indefinitely on the ground that the Petitioners were denied their right to approach the Customs, Excise and Service Tax Settlement Commission at any point of time. In fact, before passing the Order-in-Original, the Competent Authority has acceded to the requests made by the Petitioners to approach the Settlement Commission and granted substantial time to the Petitioners which can be seen from the contents of paragraph 8.1 and the chart (*supra*) referred to herein above.

8.7. In view of the above discussion, we make it clear that it shall be open to the Petitioners to file the appropriate Application under the provisions of Section 137(3) of the Customs Act, 1962 read with the Customs (Compounding of Offences) Rules, 2005 before the jurisdictional Chief Commissioner of Customs, if so advised in accordance with law for compounding of the offences. If such an Application is made, the same shall be dealt with on its own merits and in accordance with law. The intimation dated 29/10/2021 is received by the Petitioners on 16.11.2021 as informed to us across the bar. According to the Petitioners, this intimation is dated 29.10.2021. The intimation gives to the Petitioners time of 30 days from the receipt of the intimation for making the Application under the above provisions. The time of 30 days has also expired on15.12.2021. Thus, it can be seen that the Petitioners have been guilty of gross delay and laches in not abiding by and adhering to the mandate of law. The Petitioners have pleaded that the Petitioner No. 1 has paid an amount of Rs. 1,00,00,000.00 during the period of investigation and the remaining Petitioners had also prepared the demand drafts towards differential duty, penalty and interest in order to approach the Settlement Commission. We state that it shall be open to the Petitioners to pursue any other remedy available to the Petitioners including the application to the Settlement Commission in accordance with law. Needless to state that if the Petitioner(s) have voluntarily paid any amount during the period of investigation as stated, the Petitioners shall be entitled to a set off for the said amount.

9. In view of the above directions and findings, we find no merit in the Petition and the Interim application filed by the Petitioners. Petition and the Interim Application accordingly stand dismissed with no order as to costs.

[MILIND N. JADHAV, J.] **[CHIEF JUSTICE]**

RAVINDRA MOHAN AMBERKAR

Digitally signed by RAVINDRA MOHAN AMBERKAR
Date: 2021.12.21 11:15:54 +0530