
(2010) 03 MAD CK 0203

In the Madras High Court

Case No : W.A. No. 1238 of 2009 and M.P. No. 1 of 2009

Optigrab International

APPELLANT

Vs

Government of India

RESPONDENT

Date of Decision : 23-03-2010

Acts Referred:

Central Excise Rules, 2002 — Rule 19(2)
Constitution of India, 1950 — Article 21
Criminal Procedure Code, 1973 (CrPC) — Section 219
Customs Act, 1962 — Section 124, 127(1), 127A, 127B, 127B(1)
Customs, Central Excise Duties and Service Tax Drawback Rules, 1995 — Rule 16
Finance Act, 2007 — Section 127(1), 91

Citation : (2010) 253 ELT 722

Hon'ble Judges : R. Banumathi, J; M. Venugopal, J

Bench : Division Bench

Advocate : S. Senthilnathan, for the Appellant; S. Thirumavalavan, SCGSC, for the Respondent

Final Decision : Dismissed

Judgement

M. Venugopal, J.—This writ appeal arises out of order of the single Judge made in W.P. No. 695 of 2009 dated 14-7-2009 [2009 (243) E.L.T. 679 (Mad.)] confirming the order of Additional Bench of Customs and Central Excise Settlement Commission holding that the Settlement Application filed by the Appellant in respect of three show cause notices is not maintainable u/s 127B of the Customs Act and that the applications do not satisfy the pre-requisites of Section 127B.

2. The brief facts are that the Appellant is a manufacturer and exporter of ready made garments. The entire garments manufactured were exported to overseas customers viz., M/s. Knock out, M/s. Esprit and M/s. S. Oliver Company. Under Rule 19(2) of Central Excise Rules, the Appellant firm availed certain duty free cotton yarn/fabrics without paying duty for such imports. On gathering intelligence that the Appellant procured duty free cotton yarn/fabrics by availing benefits under Rule 19(2) of Central Excise Rules, 2002 as amended and used

the back scheme. Investigations were conducted by Director of Central Excise & Intelligence, Chennai, who issued three show cause notices under:

S. Party's Name SCN No. and date Amount of duty involved No. (m/s.)
Commissionerate

1. M/s. Optigrab F. No. INV/DGCEI/ Rs. 2,09,784/- international, CHZU/88/2004/5820 Deputy Commissioner Chennai-41. dated 9-9-2008 SCN Chennai Customs (SEA) No. 82/2008 2. M/s. Optigrab F. No. Rs. 2,83,780/- International, INV/DGCEI/CHZU/ Deputy Commissioner of Chennai-41 88/2004/5820 9-9- Customs, Tuticorin 2008 SCN No. 83/2008 3. M/s. Optigrab F. No. INV/DGCEI/ Rs. 1,42,021/- international, CHZU/88/2004/5820 Deputy Commissioner Chennai-41 9-9-2008 SCN No. Chennai Customs(AIR) 84/2008 Total liability 6,35,585/-

The Appellant filed a single common application for settlement accepting the entire duty liability of Rs. 6,35,585/- covered by 3 show cause notices. Notice was issued to the Appellant on 28-10-2008 directing to state whether the Appellant has fulfilled all the conditions laid down u/s 127B of the Customs Act. upon examining the application and connected records, Bench has held that show cause notices were issued and answerable to 3 different Commissionerates and cases covered by three show cause notices are three different cases and cannot be considered as one. Bench has further held that on treating them as three different cases no application for settlement shall be made as the prerequisite of the limit of Rs. 3 lakhs of additional amount of duty accepted in the application as laid down under Clause (b) of the first proviso to Sub-section (1) of Section 127B was not satisfied and as such no application would lie in these cases.

3. Challenging the order of the Bench dated 11-11-2008, the Appellant has filed W.P. No. 695 of 2008. The learned single Judge held that the bill of entry or shipping bill was issued by three authorities and three show cause notices were issued by those three authorities and each one of the show cause notices below Rs. 3 lakhs the Settlement Applications filed u/s 127B was not maintainable and learned single Judge declined to quash the order of Bench.

4. Learned Counsel for the Appellant Mr. Senthil Nathan contended that the authorities grossly erred in interpreting Clause (b) of the first proviso to Section 127B(1). The main plank of contention of Appellant is that all the three Applications should have been taken as one. The learned Counsel for Appellant would further submit that the word "case" was defined u/s 127A(b) of the Act and the same is not to be strictly interpreted but to be construed as any proceeding under the Act, not depending upon any territorial jurisdiction. The learned Counsel would further submit that Section 127B confers only the pecuniary jurisdiction and does not deal with different authorities and therefore the authorities ought to have taken three show cause notices as one and the learned single Judge ought to have allowed the Writ Petition.

5. The contention of the learned Counsel for the appellant/petitioner is that the word "case" u/s 127A(b) of the Customs Act 1962, does not relate to a particular territorial jurisdiction but it only speaks of a pecuniary jurisdiction and that 127A(b) was not to be strictly construed.

6. Continuing further, the learned Counsel for the appellant referred to Section 4 of the Act which speaks of "appointment of officers of Custom" to Section 5(2) of the Act which enjoins the "Power of Officers of Customs". Admittedly, Section 4(2) of the Act is a new provision which empowers the Central Government to delegate to the power and the superior officers of Customs, the power to appoint subordinate officers, indeed, Section 5(2) of the Customs Act is a new provision which enables the Officer of the Customs to perform functions of their subordinates when ever necessary. In this connection, it is significant to make a mention that in 2006 (111) ECC 711 , it is held that "in view of the ingredients of Section 5(2) of the Act, it is not illegal on the part of the Commissioner to Adjudicate a case where the show cause notice was issued and answerable to the Additional Commissioner".

7. Advancing the argument, the learned Counsel for the appellant/petitioner contends that Section 219 of Criminal Procedure Code speaks of "clubbing of cases" and the three offences of same kind within a year may be charged and even though three show cause notices were issued to the appellant/petitioner, the appellant is entitled to club these cases and law is not settled in regard to this position.

8. According to the learned Counsel for the Appellant, three show cause notices u/s 124 of the Customs Act, 1962 were issued by the Assistant Director, Directorate of Central Excise Intelligence, Chennai Zone Unit, Chennai and if the three show cause notices are not clubbed then, the liberty of the Appellant under Article 21 of the Constitution of India is infringed.

9. it is also the contention of the learned Counsel for the Appellant/Applicant it was not provided with an opportunity of oral hearing when the Settlement commission issued notices dated 28-10-2008 to it as per Section 127C(1) of the Customs Act 1962 in respect of the settlement application but the Settlement Commission while passing orders, had taken into account only the appellant's counsel's written reply and therefore, there was a violation of Principles of Natural Justice.

10. Contending that the settlement is an exception of the normal procedure contemplated under the Act, the learned Counsel for respondents submitted that the proviso of Section 127B has to be construed strictly and three different show cause notices cannot be considered as one. It was further submitted that as the duty involved in all three show cause notices is less than Rs. 3 lakhs, no single application shall be made in this case and each one case will have to be treated as single case and the authorities rightly held that the pre-requisites of Section 127B was not satisfied and learned single Judge rightly dismissed the writ

petition.

11. The Appellant exported the goods by shipping bills from three different destinations - Port/airport i.e., Sea Port of Chennai and Tuticorin and Airport chennai under Rule 19(2) of Central Excise Rules, the Appellant firm availed certain duty from import of cotton yarn and fabrics without paying duty for such imports. Three show cause notices were issued and answerable to three different adjudicating authorities in three different Commissionerates i.e., Deputy Commissioner, Chennai Customs Sea Port, Deputy Commissioner of Customs, Tuticorin and Deputy Commissioner of Customs (Air), Chennai. The Appellant has filed Application for settlement of cases u/s 127B of the Customs Act.

12. Section 127B of the Customs Act reads as under:

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 but excluding the goods not included in the entry made under this Act 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 filed the additional amount of customs duty accepted by him along with interest due u/s 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).

(1-a) 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 u/s 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.

13. As per the plain reading of the first proviso to Section 127B of the Customs Act, the Applicant can file an application for settlement if a show cause notice has been issued and the admitted duty liability exceeds Rs. 3 lakhs, which means for each and every application there should be a notice and the additional duty liability admitted should be more than Rs. 3 lakhs for each and every application.

14. Even though, on the side of the appellant an endeavour was made to put forward the contention that the term "case" u/s 127A(b) of the Customs Act speaks of "Pecuniary Jurisdiction u/s 127A of the Act does not refer to proper territorial jurisdiction. At this stage, one cannot ignore an important; fact that the term "case" as per Section 127A(b) of the Act means any proceeding under this Act or any other Act for the levy assessment and collection of Customs Duty, pending before an Adjudicating Authority on the day on which the application under Sub-section (1) to Section 127A(b) is made, (substituted as per Finance Act, 2007 (22 of 2007) Section 91 (w.e.f. 1-6-2007) we are of the view that such a contention was untenable because of the fact that Section 127A(b) of the Act categorically refers to any proceeding under the Customs Act or any other Act for levy assessment and collection of Customs Act, pending before an Adjudicating Authority on the date of which the application under Sub-section (1) Section 127A(b) of the Act was made. As such it does not expressly or impliedly refer to multiple proceedings before the different authorities in our considered view. Therefore the contention of the appellant that Section 127A of the Customs Act does not refer to proper territorial jurisdiction is not accepted by this Court.

15. In the instant case, the Appellant has filed a common application in respect of three show cause notices issued to the Appellant by three different Commissionerates. The word "case" was defined u/s 127A(b) of the Act as "any

proceeding under this Act or any other Act for the levy, assessment and collection of customs duty, pending before an adjudicating authority on the date on which an application under Sub-section (1) of Section 127 is made:

Provided that when any proceeding is referred back in any appeal or revision, as the case may be, by any court, Appellate Tribunal or any other authority, to the adjudicating authority for a fresh adjudication or decision, as the case may be, then such proceeding shall not be deemed to be a proceeding pending within the meaning of this Clause.

Section 127A does not speak about multiple proceedings before multiple adjudicating authorities.

16. The contention of Appellant is that there should be liberal interpretation of first proviso to Section 127B and Section 127A(b). Learned Counsel would submit that even though show cause notices were issued by three different Commissionerates, the adjudicating authority is one and the same, who is vested with jurisdiction to decide the matter and therefore even though there were three show cause notices, a single application filed by the Appellant is maintainable. It was further contended that when adjudicating authority is one and the same, it cannot be said that show cause notices issued by three different Commissionerates are different and that separate applications are to be filed.

17. Therefore, in the present case, three show cause notices were issued which were answerable to three different Adjudicating Authorities before three different Commissionerates and as such the cases covered in the three show cause notices are only three different cases (1) before Deputy Commissioner, Chennai (Sea Port), (2) Deputy Commissioner of customs, Tuticorin, (3) Deputy Commissioner of Customs (Air) Chennai and therefore, they cannot be treated as one single case and as a matter of fact it cannot be clubbed. The appellant cannot seek in aid of Section 219 of Criminal Procedure code which is alien to the Customs Act especially with reference to the meaning of the "case" as per Section 127A(b) of the Act which has found its meaning of levy assessment and collection of Customs Duty pending before the Adjudicating Authority etc. and all the more, the said term "case" does not any way refer to three offences of such kind within a year that may be charged, like the one u/s 219 of Criminal Procedure Code and therefore, the submission of the learned Counsel for the appellant in regard to the applicability of Section 219 of Cr.P.C. is negated by this Court. Admittedly no criminal cases were filed against the appellant by the second respondent. Only if criminal cases were filed by the second respondent, the second respondent may Seek in aid of Section 219 of Cr.P.C. Hence the application of section of 219 Cr.P.C. for clubbing of three show cause notices is untenable. Even if criminal cases are filed for the offences committed then there is no embargo in law for separate trial of each offence as per the decision of the Hon'ble Supreme Court *Ranchhodlal Vs. State of Madhya Pradesh*, .

18. The contention that the first proviso to Section 127B and 127A(b) have to be

liberally construed does not merit acceptance. The Appellant is importer of cotton yarn and exporter of ready made goods. He has imported duty free goods and availed benefits under Rule 19(2). The duty drawback and exporting goods is not on voluntary basis, but on the basis of search and investigation conducted by the Directorate of Central Excise and Intelligence.

19. Another aspect of the matter is that as per Section 127(B)(1)(b) of the Customs Act, it is candidly clear that no application for settlement shall be made unless the cases relate to the additional amount of duty accepted by the applicant in his application exceeds Rs. 3,00,000/- and in the present case, three show cause notices each refers to a sum of Rs. 2,09,784, Rs. 2,83,780 and Rs. 1,42,021/- and in all it comes to Rs. 6,35,585/-. As such we are of the considered view that the ingredients of Section 127(B)(1)(b) of the Act have not been satisfied and therefore, the application for settlement of cases is not maintainable in so far as the Appellant/writ Petitioner is concerned.

20. In regard to the contention that there was violation of Principles of Natural Justice in not affording an opportunity of hearing either in person or through his authorised representatives to the Appellant, we point out that in the reply of the appellant through its counsel dated 3-11-2008, no personal hearing was sought for. it is true that Natural Justice being a concept its principles are not an edicts of a statute but since the impugned order of the Customs and Central Excise Settlement Commission, Additional Bench, dated 11-11-2008 has examined the application of the appellant and other connected records thereby, it had taken into consideration the reply of the appellant through its advocate dated 3-11-2008, we conclude that just because no personal hearing of the appellant or through representative was given to the appellant, it could not be said that there was violation of Principles of Natural Justice. More so, the subject matter of controversies/disputes between the parties only impinge upon the interpretation of the various Sections of the Customs Act on legal plane and therefore, no prejudice was caused to the Appellant in not providing opportunity of hearing to its authorised representative.

21. when the term "case" as per Section 127A(b) of the Act was clearly defined "meaning" any proceeding under the Customs Act or any other Act in regard to levy assessment and collection of Customs Duty, pending before the adjudicating authority when an application under Sub-section 1 of Section 127B was made pertaining to the application for Settlement of cases then by no stretch of imagination, it could be contended on behalf of the appellant that there was violation of Article 21 of the constitution of India, viz., personal liberty of the Appellant because of the simple fact that each show cause notice was a separate case before each commissionerates concerning with a amount of duty of less then Rs. 3,00,000/- each was a reasonable classification and therefore, mere was no question of any infringement under Article 21 of the Constitution of India relating to liberty of the Appellant and any contra view of the appellant in this regard was only an imaginary one stretching the concept of liberty too far.

22. Section 74 of the Customs Act 1962 refers to Drawback allowable on re-export of duty paid goods, as far as the present case is concerned, the first respondent had not applied the ingredients of Section 25A of the Customs Act, 1962 but it intended to demand the Customs and Central Excise Duty Drawback as per Rule 16 of the Customs and Central Excise Duty Drawback Rules, 1995 issued as per Section 75 of the Customs Act.

23. Significantly, Section 75 of the Customs Act refers to "Drawback" on imported material use in the manufacture of goods which were exported and if this Section and the rules read together indicate that if the exported goods were manufactured out of articles chargeable to duty on which duty was paid the whole of such duty or such sum as specified under the Rules as the average amount duty paid shall be payable to the Exporter by way of a Drawback as per decision Premier Tyres Ltd. Vs. Assistant Collector and Others, . Also in 1992 (57) ELT 451 .

24. The whole idea to grant the benefit of Drawback duty was to increase, permit and develop the export. Hence, when the customs authority was satisfied that the goods were brought for export and the clearance there of was permitted and particularly when the consideration for export was released or ensured then nothing was to be looked into for the purpose of granting benefit of Drawback duty no matter whether the goods were received by the consignee concerned as per decision Terai Overseas Limited Vs. Union of India (UOI), .

25. In fact the first respondent made a claim of interest (as per Section 75A(2) of the Act which speaks of interest on Drawback) at the rate mentioned in Section 28(A) of the Customs Act, in and by which the interest was to be paid when there was failure to pay the duty determined as per Sub-section (2) ibid within three months from the date of determination, in our case, all the three show cause notices issued to the Appellant was dated 9-9-2008 and that it paid a total sum of Rs. 10,35,585/- voluntarily. As a matter of fact, the three show cause notices SCN 82/08, 83/08, 84/08 dated 9-9-2008 issued by the Assistant Director of the first respondent referred to the Appellant/Petitioner's suppression of the factum of having availed the benefits duty free procurement of fabrics under Notification 43/2001 dated 26-6-2001 as per Rule 19(2) of the Central Excise Rules 2002 and consequently availed all industry rate of duty Drawback in their shipping bills under which the final garment i.e., Garments were manufactured and exported.

26. Chapter XIVA of the Customs Act, being an exemption to the normal procedure contemplated under the Act and occurring in a fiscal statute, has to be necessarily construed strictly, in our considered view, the scope of the proceedings cannot be unduly enlarged. In cases where there was no deliberate or intended desire on the part of importer to evade or avoid payment of customs duty, to provide immunity and protection of such class of people, Legislature has incorporated Chapter XIVA. As a matter of fact, Chapter XIVA was introduced by parliament by relying on similar provisions under the Income Tax Act with a view

to introduce remedial measure by way of Settlement Commission, such provision cannot be interpreted to enlarge the scope of settlement where there was deliberate evasion of duty. Cases of mis-declaration and improper availing of benefits entail in confiscation, penal proceedings and others. Settlement Applications u/s 127B are filed admitting the duty liability. The Settlement Commission has power to award interest and penalty as per decision The Commissioner of Customs Vs. A. Mahesh Raj, . Also it has jurisdiction to reject the application at the preliminary stage as per decision Union of India (UOI) Vs. Hoganas India Ltd. and Others, . Allowing of settlement applications means there may not be any penal proceedings and confiscation, in such circumstances, when the Applicant seeks to avail benefit of settlement, the provisions of Section 127A and 127B are to be strictly construed. There is no force in the contention of the learned Counsel for the appellant that the provisions are to be liberally construed.

27. In the light of qualitative and quantitative discussions as referred to supra and on appreciation of the entire gamut of the facts and circumstances of the case in an integral fashion and after going through the order of the learned single Judge passed in W.P. No. 695 of 2009 dated 14-7-2009, we opine that the said order of dismissal of the writ petition is a well considered one which does not require any interference by this Court and resultantly, the writ appeal fails.

28. In the result, the writ appeal is dismissed leaving the parties to bear their own costs. The connected miscellaneous petition is also dismissed.