(2004) 12 DEL CK 0044

In the Delhi High Court

Case No : Writ Petition No. 9620 of 2003

Standard Surfactants Ltd. APPELLANT

Vs

Union of India (UOI) and Others RESPONDENT

Date of Decision : 14-12-2004

Acts Referred:

Customs Act, 1962 — Section 127C, 127H, 127I
Foreign Trade (Development and Regulation) Act, 1992 — Section 11(5)

Citation : (2005) 193 CTR 279

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : R. Santhanam and Sanat Kumar, for the Appellant; Anil Nag, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—The petitioner obtained an advance license for import of capital goods at concessional rates in September, 1994, and imported the said goods. The petitioner had to correspondingly fulfill the export obligations. The petitioner was unable to fulfill the export obligations within the stipulated period of time.

2. The Government of India issued a public notice dt. 6th April, 1999, permitting extension of export obligations, but the request made by the petitioner was declined. The petitioner sought to challenge the same by filing CWP No. 497 of 2000 which was disposed of on 23rd Jan., 2001 with direction for the respondents to give a hearing to the petitioner and, thereafter, take the decision by a speaking order.

3. The petitioner was also directed to furnish a bank guarantee, which was furnished on 16th Feb., 2001. Respondent No. 2, Director General of Foreign Trade, however, vide communication dt. 27th Feb., 2001, suspended the importer-exporter code of the petitioner. The revocation of the suspension is one of the prayers in the present petition.

4. The petitioner addressed a communication dt. 14th Feb., 2001 to the Asstt. Commr. of Customs and made a pre-deposit of Rs. 14,80,400 seeking the waiver of penalty and interest. Since this did not find favor with the respondent-Department, an application was filed on 31st July, 2001, before the Settlement Commission, Customs and Central Excise, by the petitioner, which was decided on 4th Sept., 2002. In terms of the order passed by the Settlement Commission under sub-s. (7) of s. 127C of the Customs Act, 1962 (hereinafter to be referred to as, ''the Customs Act''), the customs duty amount was settled for Rs. 14,80,400 which had already been paid. This is based on the finding that the reasons advanced by the petitioner for non-fulfilment of export obligations were, optima facie, correct and the petitioner had tried to get the period of export obligations extended, but could not succeed in the same. The contention of the petitioner that the electrical parts had been acquired at standard rate of duty was also found to be correct and this was, in fact, conceded by the Revenue Department before the Settlement Commission. The interest was held not applicable and even fine and penalty were waived since the petitioner had made full and true disclosure of the duty liability. Immunity was also granted from prosecution.

5. Despite the aforesaid decision of the Settlement Commission, the Director General of Foreign Trade did not discharge the bank guarantee and the representations of the petitioner that the complete matter stood settled in view of the said order of the Settlement Commission was not accepted.

6. An order was passed on 9th/10th Dec, 2003, by the Addl. Director General of Foreign Trade in terms whereof the petitioner was called upon to pay a sum of Rs. 22,77,788 towards interest liability within four weeks, failing which the bank guarantee submitted by the petitioner was to be encased after obtaining leave from the High Court. This leave was required in view of the directions passed in CCP No. 500 of 2003 on 17th Sept., 2003. Further, action was directed to be initiated against the firm to confiscate the capital goods under s. 11(5) of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter to be referred to as ''Foreign Trade Act'') and for maintenance of suspension of the importer-exporter code.

7. The substratum of the decision of the respondents is based on an opinion obtained from the Law Ministry dt. 29th July, 2002, to the effect that the Settlement Commission can entertain application for settling the disputes only in matters where the importer/exporter has not made full and true disclosure of the duty liability before the proper officer. Since the goods were already declared in the present case, the petitioner was under obligation to fulfill the export obligation to get benefit of the scheme, failing which the interest was liable to be paid. This legal opinion was followed up by a circular of the Ministry of Finance, dt. 25th Feb., 2003, to the effect that in case any conditions of the advance/ EPCG license were not fulfillled, the liability to pay interest on the duty would not get extinguished despite the final order issued by the Settlement Commission as

the Settlement Commission has jurisdiction only under the Customs Act and not under the Foreign Trade Act.

8. The submission of learned counsel for the petitioner is that order of the Settlement Commission settles the complete dispute in view of the nature of jurisdiction exercised by the said Commission as also the fact that once the issue of customs duty is settled and interest is waived as also penalty, the respondents cannot recover interest or take any punitive action, since there is no other duty payable other than the customs duty. It is, thus, submitted that in case the petitioner is made to pay the amount, it would amount to nullifying the order of the Settlement Commission. Learned counsel referred to the communication addressed to the bank dt. 14th July, 2003, in respect of forfeiture of the bank guarantee to further substantiate this plea that the amount had to be remitted to the head of accounts of customs revenue and it was not being charged on any other account. The additional plea raised by learned counsel for the petitioner is that in any case this circular has come post the passing of the order of the Settlement Commission and since the order of the Settlement Commission has not been challenged and has attained finality, any subsequent circular cannot affect the findings arrived at by the Settlement Commission.

9. Learned counsel referred to provisions of the Customs Act dealing with the settlement of cases which fall in Chapter XIV-A of the said Act. The relevant sections are as under:

"127-H. Power of Settlement Commission to grant immunity from prosecution and penalty.-(1) The Settlement Commission may, if it is satisfied that any person who made the application for settlement under s. 127B has co-operated with the Settlement Commission in the proceedings before it and has made a full and true disclosure of his duty liability, grant to such person, subject to such conditions as it may think fit to impose, immunity from prosecution for any offence under this Act or under the Indian Penal Code (45 of 1860) or under any other Central Act for the time being in force and also either wholly or in part from the imposition of any penalty, fine and interest under this Act, with respect to the case covered by the settlement;

127-I. Order of settlement to be conclusive.-Every order of settlement passed under sub-s. (7) of s. 127C shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force."

10. Learned counsel, thus, submits that the order of settlement passed under sub-s. (7) of s. 127C (which is the nature of the order passed) on an application filed by a party under s. 127B of the Customs Act is to be conclusive and cannot be reopened in proceedings whether under the Customs Act or under any other law for the time being in force. Section 127H of the Customs Act further provides for immunity from prosecution and in such a case, even those proceedings

cannot continue.

11. Learned counsel for the petitioner drew attention of this Court to the provisions of s. 245-I of the IT Act, 1961 (hereinafter to be referred to as,: ''IT Act''), where there is a similar provision, which is as under:

"245-I.-Every order of settlement passed under sub-s. (4) of s. 245D shall be conclusive as to the matters stated therein and no matter covered by such order shall, save as otherwise provided in this Chapter, be reopened in any proceeding under this Act or under any other law for the time being in force."

12. The aforesaid provision was interpreted by the Supreme Court in Nirmal and Navin P. Ltd. and Others Vs. D. Ravindran, , where it was held that in view of the total immunity granted by the Settlement Commission, the criminal Court could not go beyond the order passed by the Settlement Commission.

13. Learned counsel also invited attention of this Court to judgment of the Supreme Court in Hira Lal Hari Lal Bhagwati Vs. C.B.I., New Delhi, , which dealt with proceedings under the Kar Vivad Samadhan Scheme, 1998, and the issue arose about the obligations under the Foreign Trade Act. It was held that the criminal liability stood compounded on settlement of civil issues.

14. Learned counsel for the respondents, however, sought to emphasise that jurisdiction under the two Acts is different and the two judgments referred to by learned counsel for the petitioner both dealt with the issue of criminal proceedings coming to an end on settlement of civil liability. Learned counsel also referred to the provisions of s. 127B of the Customs Act, which is as under:

"127B. Application for settlement of cases.-(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 : ...."

15. Learned counsel, thus, submitted that jurisdiction of the Settlement Commission is confined to the subject-matters mentioned in the said section and, thus, if the Commission has gone beyond the jurisdiction in dealing with matters of interest liability in case of non-performance of export obligation, the said finding of the Commission would be null and void.

16. I have considered the submissions advanced by learned counsel for the parties.

17. In my considered view, the most important aspect is the import of the order of the Settlement Commission dt. 4th Sept., 2002. This is so since it is not disputed that this order was never challenged any further and attained finality. That being the position, even the respondents have accepted the said order. It cannot be said that the respondents herein are not bound by the said order since the order was passed with the Customs Department as the respondent. This is so since the liability has arisen only on account of customs duty and not on account of any other separate levy under the Foreign Trade Act. Normally, the party importing the goods would be liable to pay duty at the stage of import. An exemption is provided for where a party importing the goods meets certain export obligations. This is done with the object of encouraging exports. The failure to comply with the export obligations would naturally imply that the duty ought to have been paid and, thus, the liability is not only for the duty, but also for penalty and interest.

18. It is not the case of the respondents that the interest is being charged on any other account, but is being charged on account of delayed payment of customs duty, which became due on account of non-fulfilment of export obligations by the petitioner. It is this very issue which was considered by the Settlement Commission.

19. The Settlement Commission in its wisdom and considering bona fide of the petitioner deemed it appropriate to exempt the payment of interest and penalty and further directed that no prosecution should also take place. If the plea of the respondents was to be accepted, it would result in a situation where the petitioner would be liable to pay interest, which interest itself has been waived by the order of the Settlement Commission. Since the order of the Settlement Commission has attained finality, this cannot be permitted to be done.

20. The judgments of the Supreme Court referred to by learned counsel for the petitioner in Nirmal & Navin (P) Ltd.''s case (supra) and Hira Lal Hari Lal Bhagwati''s case (supra) also led force to this finding that, once a matter of civil liability is settled by the Settlement Commission, even criminal liability will not arise, leave aside any liability on account of interest or penalty. The object is also salutary, which is to put an end to all kinds of litigation once the Settlement Commission has gone into the complete issue.

21. In my considered view, there is another aspect to the matter also arising from the circular issued by the Department dt. 25th Feb., 2003. It is not necessary to go into the validity of the circular because the order of the Settlement Commission was passed prior to issuance of the circular. The order itself had attained finality.

22. The effect of the impugned order dt. 9th/10th Dec, 2003, is to set at naught the findings of the Settlement Commission that no interest is payable.

23. A writ of mandamus is, thus, issued quashing the impugned order dt. 9th/10th Dec, 2003, and directing that the matters relating to any liability of the

petitioner stand settled in terms of the order of the Settlement Commission dt. 4th Sept., 2002. The natural consequence would be that the bank guarantee, furnished would be discharged and the order dt. 27th Feb., 2001 suspending the importer-exporter code of the petitioner will not remain in force and shall stand quashed as the petitioner is held not to be liable to the respondent- Department for any amount.

24. The rule is made absolute leaving the parties to bear their own costs. CM 11102 of 2004

No further directions are called for in this application in view of disposal of the Writ Petition.

Application stands disposed of.