

(2011) 06 BOM CK 0028

In the Bombay High Court

Case No : Writ Petition (Lodging) No. 129 of 2011

Union of India

APPELLANT

Vs

K. Amishkumar Trading Pvt. Ltd.

RESPONDENT

Date of Decision : 29-06-2011

Acts Referred:

Central Excises and Salt Act, 1944 — Section 11A
Customs Act, 1962 — Section 12, 127, 127(1), 127B, 127B(1)

Citation : (2011) 273 ELT 49

Hon'ble Judges : D.Y. Chandrachud, J;Anoop V. Mohta, J

Bench : Division Bench

Advocate : Pradeep S. Jetly, for the Appellant; V. Shreedharan with Prakash Shah, Sanjay Agarwal and Jas Sanghavi instructed by y M/s. PDS Legal, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule, by consent, returnable forthwith. With the consent of the Counsel and at their request, the Petition is taken up for hearing and final disposal.

2. The Union of India is in a challenge to the validity of an order passed by the Settlement Commission on the ground that a jurisdictional condition for the exercise of powers u/s 127B of the Customs Act, 1962 was not established. The Settlement Commission acting on an application filed by the First Respondent passed a Final Order on 21 December 2010.

3. A company by the name of Vinayaga Marine Petro Ltd., imported a consignment of 2044.17 metric tonnes of Prime non-alloy hot rolled steel coils from a consignor in Hongkong. The price of the goods under an invoice of 16 September 2008 was US \$ 938 per metric tonne. An advance Bill of Entry was filed on 30 September 2008. The transaction between the consignee and the shipper was not completed and according to the First Respondent, the title to the goods remained with the shipper. The First Respondent claims that it negotiated with the shipper who then agreed to sell the goods at a value of US \$ 442 per

metric tonne. The IGM was allowed to be amended by the Assistant Commissioner and Bills of Entry dated 18 November 2008 and 5 December 2008 were filed. According to the First Respondent, the demurrage charges which were accumulated till the date of the execution of the contract (6 November 2008) were to be borne by it; these being in the total sum of Rs. 1,00,03,752/-. The Bills of Entry filed by the earlier consignee were cancelled by the Assistant Commissioner of Customs. Pending the finalisation of assessment, the imported goods were to be allowed to be released provisionally on the payment of duty on the basis of the higher transaction value of US \$ 938 per metric tonne declared by the earlier consignee.

4. Initially, eighty per cent of the consignment against each Bill of Entry was allowed to be cleared. By a letter dated 23 February 2009, the First Respondent sought clearance of the balance pending finalisation of assessment and made a request for expediting the finalisation of the assessment which, till then, was on a provisional basis. By a further letter dated 31 March 2009, the First Respondent intimated the Assistant Commissioner of Customs that since the case of the Revenue had been orally explained to it, it waived its right to receive a written show cause notice. Accordingly, it was urged that the assessment of the Bills of Entry be expedited without prejudice to the right of the First Respondent to approach the Settlement Commission. On 31 March 2009, the Assistant Commissioner of Customs informed the First Respondent that the goods which had been warehoused were ordered to be released and the First Respondent was directed to appear for a personal hearing on 15 April 2009.

5. The First Respondent moved the Settlement Commission u/s 127B of the Customs Act, 1962 for settlement of the case on 11 May 2009. The Settlement Commission passed an order of admission on 11 December 2009 and a Final Order on 25 February 2010. The Settlement Commission noted in paragraph 5.2 of its order, that the contention of the Revenue was that the primary condition for filing an application for a settlement u/s 127B(1) is that the applicant must admit short levy and a show cause notice has to be issued to the applicant. In the present case, it was urged that no notice to show cause had been issued to the First Respondent - the Applicant before the Commission - and consequently, the application could not be entertained. The Settlement Commission turned down the submission on the ground that the First Respondent had by its communication waived the issuance of a notice to show cause and hence the application was maintainable.

6. On behalf of the Petitioners, counsel submitted that (i) Under proviso (a) to sub-section (1) of Section 127B, the issuance of a notice to show cause is a condition precedent to the maintainability of an application for the settlement of a case; (ii) A jurisdictional condition cannot be waived; (iii) As a matter of fact, no show cause notice can be issued unless the assessment is finalised in view of the law laid down by the Supreme Court in *Commr. Central Excise and Customs, Mumbai and Others Vs. I.T.C. Ltd. and Others*, , while construing the provisions

of Section 11A of the Central Excise Act, 1944 which are *pari materia* to Section 28 of the Customs Act, 1962.

7. On the other hand, it has been urged on behalf of the First Respondent that (i) The First Respondent does not contend that the notice to show cause can be issued u/s 28 of the Customs Act, 1962 in case of a provisional assessment; (ii) The only requirement of Section 127B is that the proper officer has issued a notice to show cause qua the Bill of Entry and Section 127B does not provide that the show cause notice should be issued u/s 28; (iii) Even before finalising a provisional assessment, a notice to show cause is necessary; (iv) By letters dated 23 February 2009 and 31 March 2009, the importer waived the notice to show cause without prejudice to its right to approach the Settlement Commission. The letter of the Assessing Officer requiring the importer to attend a personal hearing can be regarded as a notice to show cause; (v) Neither the Act nor the Rules provide for a particular form for the issuance of a notice to show cause; (vi) In its objection filed before the Settlement Commission on 23 June 2009, the Revenue had stated that the investigation was complete but a notice to show cause was to be issued. As a matter of fact, the investigations had been completed by March 2009. Though the Revenue had raised an objection on 23 June 2009 about the non-issuance of a notice to show cause, till the Settlement Commission passed an order nearly six months thereafter, on 21 December 2009, there was no restraint on the Revenue issuing a show cause notice at any time. In the circumstances, it has been urged that there was substantial compliance with the requirement of proviso (a) to Section 127 and hence a fit case was made out for the exercise of jurisdiction u/s 127.

8. u/s 127B(1) of the Customs Act, 1962, any importer/exporter or any other person may, in respect of a case, relating to him make an application before adjudication to the Settlement Commission to have the case settled. The application has to contain a full and true disclosure of the duty liability of the importer 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 an exemption notification or otherwise. The fundamental requirement of an application u/s 127-B is a full true and candid disclosure by the applicant of the liability to pay duty which was not disclosed before the proper officer and of other details to which a reference has been made hereinabove. Significantly, these include particulars of the dutiable goods in respect of which the applicant admits a short levy *inter alia* on account of mis-declaration or undervaluation.

9. The proviso to Section 127B(1) stipulates several conditions precedent to the making of an application under the provision. Now, proviso (a) to Section 127-B provides that "no such application shall be made unless (a) the applicant has

filed a Bill of Entry or a shipping bill, in respect of the 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". Under proviso (b), another condition is that the additional amount of duty accepted by the applicant must exceed rupees three lakhs, while under proviso (c), it is necessary that the applicant must have paid the additional amount of customs duty accepted by him, together with interest due. Now, in the present case, the contention of the Revenue is that the application filed by the First Respondent was not maintainable both for the reason that no notice to show cause had been issued and for the reason that the First Respondent had not paid the additional amount of customs duty and had not admitted any additional liability.

10. The conditions which have been prescribed by the proviso to sub-section (1) of Section 127 constitute a jurisdictional requirement. In the absence of compliance, there is a threshold bar to the making of the application u/s 127. Absent compliance with the conditions spelt out in the provisos, no application can be made. An applicant cannot invoke the jurisdiction of the Settlement Commission unless the conditions which are prescribed in the proviso are duly fulfilled. In the present case, admittedly, no notice to show cause was issued to the First Respondent by the proper officer. The fact that there was no written notice is an admitted position. The contention of the First Respondent, however, is that the First Respondent waived the requirement of the issuance of a notice to show cause following which it was called for a personal hearing by the Assessing Officer. On 23 February 2009 the First Respondent addressed a letter to the Assistant Commissioner seeking the release of the balance constituting 74 out of 371 packages on a provisional basis pending finalisation of assessment and requested the officer to finalise the assessment. Subsequently on 31 March 2009, the First Respondent stated that since the case of the Revenue had been orally explained to it, it waived its right to receive a written show cause notice and requested the Assistant Commissioner to expedite the process of assessment without prejudice to its right to approach the Settlement Commission.

11. Relying on the judgment of the Supreme Court in *Commissioner of Customs, Bombay Vs. Virgo Steels, Bombay and Another*, it was sought to be urged that a notice u/s 28 can be waived. In that case, a letter was addressed by the importer stating that it was ready to pay the duty chargeable along with penalty and that it did not want a notice to show cause for a personal hearing. Based on the letter of the importer, the Collector of Customs computed the duty that was leviable and imposed a penalty. However, despite this the Tribunal, held in Appeal that non issuance of a show cause notice as required u/s 28 had vitiated the proceedings initiated by the Collector of Customs. The Supreme Court held that the jurisdiction of the proper officer to initiate proceedings for recovery of duty which had escaped collection, is not traceable to Section 28 and is a concomitant power which arises out of the levy of customs duty u/s 12. The Supreme Court held that the requirement of a notice u/s 28 enures to the benefit to the individual concerned, who can waive that right. Virgo Steels having specifically

waived its right to the issuance of a notice could not be permitted to turn around and contend that the proceedings initiated against it were void for want of a notice u/s 28.

12. The issue, however, that arises before the Court in the present case is whether a jurisdictional condition which is imposed by the proviso to Section 127-B(1) can be obviated by the applicant contending that he has waived the issuance of a notice to show cause. In our view, the answer to that issue must necessarily lie in the negative. Proviso (a) to sub-section (1) of Section 127 spells out the stage at which an application can be made to the Settlement Commission, An application cannot be filed unless the applicant has filed a bill of entry or shipping bill in respect of the import or export of goods and in relation to such bill of entry or shipping bill a show cause notice has been issued to him by the proper officer. These conditions have to be cumulatively fulfilled and are mandatory. If an application has to be filed to the Settlement Commission, there is no question of the applicant waiving the notice to show cause. Accepting such a contention would defeat the Parliamentary intent. The issuance of a notice to show cause is an important stage and when it is made a jurisdictional requirement - in the absence of which even an application cannot be made - an applicant cannot set up a waiver of such a condition. Parliament has legislated by requiring that no application u/s 127-B(1) can be made unless a notice to show cause has been issued. In the absence of a notice to show cause a mandatory jurisdictional requirement is not fulfilled. Absent a notice to show cause, the Settlement Commission cannot assume jurisdiction. An assessee cannot by his own act of waiving the issuance of a notice to show cause confer jurisdiction upon the Settlement Commission. The judgment in *Virgo Steels* held that where the assessee had informed the Assessing Officer that he waived the notice to show cause and on the basis of such a letter there was a demand of duty coupled with penalty, the assessee could not be allowed to turn around and contend that a notice had not been issued. In the present case, the issue, as we have noted is different, namely as to whether absent a notice to show cause, the Settlement Commission can assume jurisdiction to entertain an application u/s 127B. For the reasons that we have indicated above, we answer that question in the negative and consequently hold that the assumption of the jurisdiction by the Settlement Commission in the present case was contrary to law.

13. For these reasons, we make the rule absolute by setting aside the impugned orders dated 25 February 2010 and 21 December 2010 of the Settlement Commission.

14. In prayer clause (b)(ii) of the Petition, the Union of India has sought an order for the refund of an amount of Rs. 3,15,98,637/- deposited by the Revenue in Writ Petition No. 5486/2010 together with interest accrued thereon to the Revenue. We may note at this stage that Writ Petition No. 5486/2010 was filed by the First Respondent for enforcing the final order passed by the Settlement Commission. Since the order of deposit has been passed in that writ petition, we

will issue an order for refund of the moneys deposited in Court by Union of India separately while passing an order on the companion writ petition.

15. The Union of India would be at liberty to now proceed for the purposes of carrying out assessment proceedings in accordance with law.

16. Learned counsel for the First Respondent requested the Court to issue a direction for expeditious completion of the assessment proceedings. Counsel appearing on behalf of the Union of India states that the assessment shall be completed within a period of eight weeks from today.

17. Rule is made absolute accordingly in the aforesaid terms. There shall be no order as to costs.