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Court : Mumbai

Decided On : Nov-03-2014

Judge : A.a. Sayed, S.C. Dharmadhikari

Appeal No. : Writ Petition No. 12153 of 2012

Appellant : Sunil Gupta

Respondent : Union of India

Judgement :

S.C. Dharmadhikari, J.

1. By this Writ Petition, under Article 226 of the Constitution of India, the Petitioner is seeking following reliefs:

"a. The Hon'ble Supreme Court maybe pleased issue appropriate writ, order or directions for setting aside the impugned Show Cause Notice No. DRI/MZU/E/1/2008 dated 5.2.2009 in view of the fact that Respondent No. 3 is not a 'proper officer' in terms of Section 2(34) of the Act and, therefore, the Notice as well as the entire adjudication proceedings are non -est, otiose, nugatory, null and void ab initio as held by this Hon'ble Court in "Commissioner of Customs v. Sayed Ali, : (2011) 3 SCC 537"

b. That this Hon'ble Court may further be pleased to issue an appropriate writ, order or directions, declaring the amendment to Section 28 of the Customs Act, 1962 by inserting clause (11), whereby, it provided "all persons appointed as officers of Customs under sub section (1) of section 4 before the sixth day of July, 2011 shall be deemed to have and always had the power of assessment under Section 17 and shall be deemed to have been and always had been the proper officers for the purposes of this section" to be Ultra vires and unconstitutional as the said amendment is violative of Articles 14, 19 and 21 of the Constitution of India.

c. That this Hon'ble Court may further be pleased to issue an appropriate writ, order or directions for setting aside the Circular No. F. No. 437/143/2009 -Cus. IV dated 23rd September, 2011, whereby, in terms of the amended Section 28 of the Customs Act, 1962, directions have been issued to the relevant authorities that "Show Cause Notice issued prior to 6.7.2011 by officers of Customs, which would include officers of Commissionerates of Customs (Preventive), Directorate General of Revenue Intelligence (DRI), Directorate General of Central Excise Intelligence and similarly placed officers stand validated since these officers are retrospectively recognized as 'proper officers' for the purpose of Section 17 and 28 of the said act" as the amendment supra on the basis of which the impugned circular has been issued, itself is ultra vires and unconstitutional.

....."

2. The background, in which these reliefs are sought, is that the Petitioner was served with a show cause notice by the Directorate of Revenue Intelligence. This was pursuant to an investigation which was conducted. We are not concerned in this case with the fundamental rights guaranteed to the Petitioner under Article 21 of the Constitution of India. We are concerned in this case with a adjudication and which is subject matter of the Customs Act, 1962. This show cause notice, copy of which has been annexed to the Writ Petition, alleges that the Petitioner has been associated with the firms which are styled as dummy firms. During the course of investigation, it was revealed that certain goods were imported in the names of these firms. They have been mis -declared in terms of description, quantity and

value. The goods were seized. Then, there is reference to six more similar consignments, which were lying at the Air Cargo Complex, Sahar, Mumbai and it has been revealed that these consignments and those earlier imported were brought in without compliance with the Customs Act, 1962. There are serious violations alleged and of this enactment. The Petitioner's role has been also set out and in somewhat details. The Petitioner is stated to be owner of M/s. S.G.V. Industries. A statement was recorded of one Manish Amlani, partner of M/s. S. K.D. Shipping Agency, a Customs House Agent. The reference to all these materials is to be found in para 30 of the show cause notice and eventually what has been alleged therein is that the Petitioner and those named in the show cause notice are prima facie guilty of violations of the Customs Act, 1962 and several rules framed thereunder. The Petitioners have moved this Writ Petition in this Court and upon which no ad-interim reliefs or interim reliefs have been granted. Resultantly, the matter could have proceeded and without being influenced by the pendency of this Writ Petition.

The learned Counsel appearing on behalf of the Petitioner has confined his arguments only to the legality and validity of sub section (11) of section 28 of the Customs Act, 1962. It is urged that this section is ultra vires the Customs Act, 1962, as the same fails to take note of the Explanation 2. In other words, it is submitted that section 28 enables recovery of duty not levied or short levied or erroneously refunded. Sub section (11) thereof has been inserted by Act 14 of 2011 w.e.f. 16th September, 2011. That states that notwithstanding anything to the contrary contained in any Judgment, Decree or Or. of any Court of law, Tribunal or other authority, all persons appointed as officers of Customs under sub section (1) of section 4 before 6th July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper officers for the purpose of this section.

3. It is submitted that Explanation 2 removes any doubts and states that any non levy, short levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, continues to be governed by the provisions of section 28 as they stood immediately before the date on which such assent is received.

4. The argument on legality and validity is premised on the fact that the Directorate of Revenue Intelligence and those working in the same cannot be termed as proper or competent officers for the purposes of the adjudicatory functions under the Customs Act, 1962. They do not answer the definition of the term "proper officer" and which has been defined in the Customs Act, 1962. In that regard, our attention has been invited to section 2(34), which defines this term and our attention has also been invited to section 17 of the said Act. It is urged that the functions and which have been specifically entrusted to the proper officers and which term is also defined, do not include the Director or the Directorate of Revenue Intelligence. The argument is that if the contention of the Department is accepted, then, there would be two commissionerates. The Act does not envisage such a position. It is only contemplating or envisaging a Customs Officer and the Customs Commissionerate. The Director of Revenue Intelligence is not and cannot be said to be a part of the said Commissionerate. Our attention has also been invited to the Judgment of the Hon'ble Supreme Court in the case of Commissioner of Customs vs. Sayed Ali and Anr. : (2011) 3 SCC 537 Mr. V.B. Singh, the learned Counsel appearing on behalf of the Petitioner also invited our attention to a order dated 4th February, 2013 of the High Court of New Delhi in the case of Mangali Impex Ltd. Vs. Union of India and Ors. . He submits that the High Court of New Delhi is seized of similar Petitions and they have been posted for hearing and final disposal. This Court therefore either should await that adjudication or permit the Petitioner to seek time and approach the Hon'ble Supreme Court of India so that both matters can be consolidated for hearing before the Delhi High Court.

5. In any event, attention is also invited to a Judgment delivered by the Karnataka High Court in the case of Devilog Systems India vs. Collector of Customs, Bangalore : 1995 (76) E.L.T. 520 (Kar.). It is submitted that once the show cause notice is issued by an officer or authority who is not competent to issue the same, then, the entire adjudication falls. The Petitioner is not required to submit himself to the jurisdiction of any incompetent authority or officer. A show cause notice, which is ab initio void for want of competency in the authority, can be challenged by way of Writ Petition under Article 226 of the Constitution of India. This Writ Petition therefore should be entertained and cannot be dismissed summarily. Our

attention has also been invited to several Tribunal Judgments by Mr. Singh. He has laid great emphasis on the observations and conclusion of the Hon'ble Supreme Court in the case of Sayed Ali (supra), where, it has been held by the Hon'ble Supreme Court that it is only the officers of Customs who are assigned functions of assessment, which of course includes reassessment. In such circumstances, they alone are competent to issue the notice under section 28 of the Act. For these reasons, it is submitted that the basis of this Judgment has not been altered by the Parliament. The Parliament has no competence to overrule the binding Judgment of the Hon'ble Supreme Court. For such reasons, the law laid down therein continues to bind us.

6. Mr. Jetly, the learned Counsel appearing on behalf of the Revenue, on the other hand, submits that this Writ Petition challenges a show cause notice issued under the Customs Act, 1962. It is settled law that this Court does not interfere under Article 226 of the Constitution of India at the stage of show cause notice. There is no prejudice or loss to parties like the Petitioner. They can appear before the authority and contest the proceedings by raising appropriate reliefs. In such circumstances, this Writ Petition should not be entertained.

However, Mr. Jetly submits that even otherwise, there is no merit in the challenge to the provisions of section 28(11) of the Customs Act, 1962. He submits that no assistance can be derived from the Judgment of the Hon'ble Supreme Court in the case of Sayed Ali (supra). There is no similarity of facts, inasmuch as the position before the Hon'ble Supreme Court was that Collector (Preventive) issued the show cause notice. In this case, the show cause notice has been issued by the Directorate of Revenue Intelligence and who was always competent to issue the same. Mr. Jetly invited our attention to the affidavit in reply to this Writ Petition and submits that the Deputy Director, who has filed this affidavit, has brought to the notice of this Court the legal position. He relies upon the Circular issued by the Central Board of Excise dated 15th February, 1999. Mr. Jetly also submits that on the basis of this Circular, the DRI was authorized to issue this show cause notice. Mr. Jetly has also relied upon the fact that the President of India has given assent to the Customs (Amendment and Validation) Bill, 2011 on 16th September, 2011 and the corresponding Act was published in official gazette on 20th September,

2011. Thus, by this amendment, what has been clarified is that the DRI was competent to issue the show cause notice. He also submits that once section 28(11) has been brought in the statute book and with retrospective effect and which validates all prior actions, then, the show cause notice in this cannot be challenged. He also relies upon a Notification No. 19/1989 - CUS (NT) dated 26th April, 1990, copy of which is at Annexure 'I' to the affidavit. He submits that this Notification has been issued in exercise of the powers conferred by section 4(1) of the Customs Act and in supersession of the Notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 186 -CUS dated 4th August, 1981 (as amended). The Central Government having appointed the officers mentioned in Column 2 in Table to be competent for the purposes of the Customs Act, 1962, then, it is futile to urge that the Director General, Directorate of Revenue Intelligence, Bombay was not a competent officer. It is submitted by Mr. Jetly that the DRI officers have been appointed as Collector of Customs and insofar as the State of Maharashtra, Gujrat, Madhya Pradesh, Goa and Union Territory of Deu and Daman, the Additional Director General of Revenue Intelligence, Bombay is the competent Custom Officer. Mr. Jetly also relies upon the Notification dated 6th July, 2011, copy of which is at Exhibit -2 at page 373 of the paper book. For these reasons, Mr. Jetly submits that the Writ Petition be dismissed.

7. Mr. Jetly has relied upon a Judgment of Hon'ble Supreme Court in the case of Sangam Spinners Ltd. Vs. Union of India : 2011 (266) E.L.T. 145 (S.C.) and for the purposes of the principle that a validating Act validates all prior actions including of the past. It removes actual or possible voidness, disability or defect by confirming the validity of anything which is or may be invalid.

8. With the assistance of Mr. Singh and Mr. Jetly, we have perused this Writ Petition and all Annexures thereto. We have also perused the affidavit filed in reply and the Annexures. We have perused the relevant statutory provisions brought to our notice. We have also perused the decisions relied upon.

At the outset, we are not impressed with the request as made by Shri. Singh and which is essentially for adjournment. There pendency of a similar Petition before

High Court of Delhi is no ground to adjourn the hearing of this Petition and which is on our file since 2012. Further, in law there is no prohibition and we can proceed to hear and decide it. The Petitioner had enough opportunity to move the Hon'ble Supreme Court and in these two years could have sought a order to consolidate both proceedings. He did nothing and now seeks to avoid the obvious.

9. The factual position is not in dispute, inasmuch as the Directorate of Revenue Intelligence, Mumbai Zonal Unit had, in February, 2008 booked a case of import of electronic goods and electronic components, which were mis -declared, allegedly. It has been alleged that the Petitioner was the brain behind such mis -declared imports and he was major beneficiary. The statements were recorded under section 108 of the Customs Act, 1962. Upon conclusion of the investigation, a show cause notice dated 5th February, 2009 was issued and differential dues to the tune of Rs. 712.73 crores have been demanded.

10. The only ground on which the show cause notice has been challenged is that the Directorate of Revenue Intelligence or the Director of Revenue Intelligence himself was not competent to issue this notice.

In that regard, reliance is placed on the Judgment of the Hon'ble Supreme Court in the case of Sayed Ali (supra). The facts in the said case need to be noted carefully. That was a Judgment delivered by the Hon'ble Supreme Court in a batch of Civil Appeals from the Judgment and Or. of the Customs, Excise and Gold (Control) Appellate Tribunal, Mumbai (CEGAT). The Judgment was delivered on 18th February, 2011. The issue therein was that the First Respondent before the Supreme Court was a partner in a firm engaged in the business of Carpet Manufacturing and Export. It was charged with misusing the Export Passbook Scheme by selling goods cleared duty free or selling the passbook on premium in violation of the ITC restriction. The investigations were commenced and concluded after which the Assistant Collector of Customs (Preventive), Mumbai issued, to the Respondent, a show cause notice alleging violation of section 111(d) of the Customs Act, 1962. On 3rd February, 1993, the same officer adjudicated the show cause notice, confirmed the demands and that is how an Appeal was preferred before the Collector of Customs (Appeals). He partially allowed it on some other

grounds and concluded to hold that the show cause notice was required to be issued by the Collector and not by the Assistant Collector. Thereafter, the Collector of Customs (Preventive) issued another show cause notice dated 16th April, 1994. In reply to the show cause notice, the jurisdiction of the Collector of Customs (Preventive) was questioned and relying upon a Notification. The two Notifications which have been relied upon are referred to in para 6 of the Judgment of the Hon'ble Supreme Court. Since the Collector confirmed the show cause notice subsequently issued, the matter was carried in Appeal before the CEGAT. The preliminary objection of the Respondent regarding jurisdiction was upheld and that is how the Commissioner approached the Hon'ble Supreme Court.

11. The arguments have been noted by the Hon'ble Supreme Court from paragraphs 10 onwards and then, reference is made by the Hon'ble Supreme Court to statutory provisions in para 17 to section 28.

It refers to the concept definition of the "proper officer". It referred to its definition in para 19 and held that only such officers of Customs, who have been assigned specific functions would be proper officers in terms of section 2(34) of the Act. Specific entrustment of function by either the Board or the Commissioner of Customs is therefore the governing test to determine whether an officer of Customs is the proper officer. It is in this situation that the Hon'ble Supreme Court concluded in para 20 to 24 as under:

"20. From a conjoint reading of Section 2(34) and 28 of the Act, it is manifest that only such a Customs Officer who has been assigned the specific functions of assessment and reassessment of duty in the jurisdictional area where the import concerned has been affected, by either the Board or the Commissioner of Customs, in terms of Section 2(34) of the Act is competent to issue notice under Section 28 of the Act. Any other reading of Section 28 would render the provisions of Section 2(34) of the Act otiose inasmuch as the test contemplated under Section 2(34) of the Act is that of specific conferment of such functions.

21. Moreover, if the Revenue's contention that once territorial jurisdiction is conferred, the Collector of Customs (Preventive) becomes a "proper officer" in terms of Section 28 of the Act is accepted, it would lead to a situation of utter

chaos and confusion, inasmuch as all officers of Customs, in a particular area be it under the Collectorate of Customs (Imports) or the Preventive Collectorate, would be "proper officer.". In our view, therefore, it is only the officers of Customs, who are assigned the functions of assessment, which of course, would include reassessment, working under the jurisdictional Collectorate within whose jurisdiction the bills of entry or baggage declarations had been filed and the consignments had been cleared for home consumption, will have the jurisdiction to issue notice under Section 28 of the Act.

22. In this behalf, our attention was also invited by Mr. Joseph Vellapally to Standing Or.No. 35/89 dated 12 -7 -1989, issued by a Collector of Customs, holding dual charges of Collector of Customs, Calcutta and Collector of Customs (Preventive) as also to certain notifications issued by the Board under Section 2(34) of the Act clearly defining the functions of the Customs House and the Preventive Collectorate.

23. In the present case, the import manifest and the bill of entry having been filed before the Collectorate of Customs (Import), Mumbai, the same having been assessed and clearance for home consumption having been allowed by the proper officer on imports executing bond, undertaking the obligation of export, in our opinion, the Collector of Customs (Preventive), not being a "proper officer" within the meaning of Section 2(34) of the Act, was not competent to issue show -cause notice for reassessment under Section 28 of the Act.

24. Nothing has been brought on record to show that the collector of Customs (Preventive), who had issued the show -cause notices was assigned the functions under Section 28 of the Act as "proper officer" either by the Board or the Collector/Commissioner of Customs. We are convinced that Notifications Nos. 250 -Cus. And 251 -Cus, both dated 27 -8 -1983, issued by the Central Government in exercise of the powers conferred by sub -section (1) of the Section 4 of the Act, appointing Collector of Customs (Preventive), etc. to be the Collector of Customs for Bombay, Thane and Kolaba districts in the State of Maharashtra did not ipso facto confer jurisdiction on him to exercise power entrusted to the "proper officers" for the purpose of Section 28 of the Act."

12. We will have to refer to the provisions of the Customs Act, which have undergone a change after the Hon'ble Supreme Court's Judgment. The Customs Act is an act to consolidate the law related to Customs. The duty which is styled as Customs Duty means a duty of Customs leviable under the Customs Act, 1962. Several terms have been defined and by section 2(8), the word "Commissioner of Customs" has been defined to mean, except for the purposes of Chapter XV to include an Additional Commissioner of Customs. Then, the terms "Import", "Import Manifest" or "Import Report" or "Import goods" and "Importer" have also been defined as also the terms "Export", "Export Goods" and "Exporter". The term "Proper Officer" is defined in section 2(34) and in relation to any functions to be performed under this Act, means the officer of Customs who is assigned those functions by the Board or the Commissioner of Customs. Then we find the officers of Customs being referred to in Chapter II and their classes. What we find from Sections 3, 4, 5 and 6 is that the Central Government may, by Notification in the official gazette, entrust, either conditionally or unconditionally to any officer of the Central or the State Government or a local authority, any functions of the Board or any officer of Customs under this Act. There are several provisions contained in Chapters III, IV and IVA, which enable the authority to deal with the importation and exportation of the goods and illegally so also prevent their disposal.

What we find thereafter and by Chapter V onwards is that the assessment of duty by section 17 is contemplated and that would have to be by the proper officer. We have several provisions therein, which enable recovery of duty and expeditiously so also exemption therefrom.

We are concerned in this case with section 28 and which reads as under:

"28. Recovery of duties not levied or short -levied or erroneously refunded: -

(1) Where any duty has not been levied or has been short -levied or erroneously refunded or any interest payable has not been paid, part -paid or erroneously refunded, for any reason other than the reasons of collusion or any wilful mis - statement or suppression of facts, -

(a) the proper officer shall, within one year from the relevant date, serve notice on the person chargeable with the duty or interest which has not been so levied or which has been short -levied or short -paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice;

(b) the person chargeable with the duty or interest, may pay before service of notice under clause (a) on the basis of, -

(i) his own ascertainment of such duty; or

(ii) the duty ascertained by the proper officer, the amount of duty along with the interest payable thereon under section 28AA or the amount of interest which has not been so paid or part -paid:

Provided that the proper officer shall not serve such show cause notice, where the amount involved is less than rupees one hundred.

(2) The person who has paid the duty along with interest or amount of interest under clause (b) of sub -section (1) shall inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under clause (a) of that sub-section in respect of the duty or interest so paid or any penalty leviable under the provisions of this Act or the rules made thereunder in respect of such duty or interest.

(3) Where the proper officer is of the opinion that the amount paid under clause (b) of sub -section (1) falls short of the amount actually payable, then, he shall proceed to issue the notice as provided for in clause (a) of that sub -section in respect of such amount which falls short of the amount actually payable in the manner specified under that sub -section and the period of one year shall be computed from the date of receipt of information under sub -section (2).

(4) Where any duty has not been levied or has been short -levied or erroneously refunded, or interest payable has not been paid, part-paid or erroneously refunded, by reason of, -

(a) collusion; or

(b) any willful mis -statement; or

(c) suppression of facts,

By the importer or the exporter or the agent or employee of the importer or exporter, the proper officer shall, within five years from the relevant date, serve notice on the person chargeable with duty or interest which has not been so levied or which has been so shortlevied or short -paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice.

(5) Where any duty has not been levied or has been short -levied or the interest has not been charged or has been part -paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis -statement or suppression of facts by the importer or the exporter or the agent or the employee of the importer or the exporter, to whom a notice has been served under sub -section (4) by the proper officer, such person may pay the duty in full or in part, as may be accepted by him, and the interest payable thereon under section 28AA and the penalty equal to twenty -five per cent. Of the duty specified in the notice or the duty so accepted by that person, within thirty days of the receipt of the notice and inform the proper officer of such payment in writing.

(6) Where the importer or the exporter or the agent or the employee of the importer or the exporter, as the case may be, has paid duty with interest and penalty under sub -section (5), the proper officer shall determine the amount of duty or interest and on determination, if the proper officer of the opinion -

(i) that the duty with interest and penalty has been paid in full, then, the proceedings in respect of such person or other persons to whom the notice is served under sub -section (1) or sub -section (4), shall, without prejudice to the provisions of sections 135, 135A and 140 be deemed to be conclusive as to the matters stated therein; or

(ii) that the duty with interest and penalty that has been paid falls short of the amount actually payable, then the proper officer shall proceed to issue the notice as provided for in clause (a) of sub -section (1) in respect of such amount which falls short of the amount actually payable in the manner specified under that sub -section and the period of one year shall be computed from the date of receipt of information under subsection (5).

(7) In computing the period of one year referred to in clause (a) of sub -section (1) or five years referred to in sub -section (4), the period during which there was any stay by an order of a court or tribunal in respect of payment of such duty or interest shall be excluded.

(8) The proper officer shall, after allowing the concerned person an opportunity of being heard and after considering the representation, if any, made by such person, determine the amount of duty or interest due from such person not being in excess of the amount specified in the notice.

(9) The proper officer shall determine the amount of duty or interest under sub -section (8), -

(a) within six months from the date of notice, where it is possible to do so, in respect of cases falling under clause (a) of sub -section (1);

(b) within one year from the date of notice, where it is possible to do so, in respect of cases falling under subsection (4)

(10) Where an order determining the duty is passed by the proper officer under this section, the person liable to pay the said duty shall pay the amount so determined along with the interest due on such amount whether or not the amount of interest is specified separately.

(11) Notwithstanding anything to the contrary contained in any judgment, decree or order of any court of law, tribunal or other authority, all persons appointed as officers of Customs under sub -section (1) of section 4 before the 6th day of July, 2011 shall be deemed to have and always had the power of assessment under section 17 and shall be deemed to have been and always had been the proper

officers for the purposes of this section.

Explanation 1. - For the purposes of this section, "relevant date" means, -

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment or re-assessment, as the case may be, thereof;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest.

Explanation 2. - For the removal of doubts, it is hereby declared that any non -levy, short -levy or erroneous refund before the date on which the Finance Bill, 2011 receives the assent of the President, shall continue to be governed by the provisions of section 28 as it stood immediately before the date on which such assent is received.

This section has undergone a change, inasmuch as it has been substituted by Act 8 of 2011 w.e.f. 8th April, 2011. Prior thereto, section 28 reads as under:

" 28. Notice for payment of duties, interest, etc. -

(1) When any duty has not been levied or has been short -levied or erroneously refunded, or when any interest payable has not been paid, part paid or erroneously refunded, the proper officer may, -

(a) in the case of any import made by any individual for his personal use or by Government or by any educational, research or charitable institution or hospital, within one year;

(b) in any other case, within six months, from the relevant date, serve notice on the person chargeable with the duty or interest which has not been levied or charged

or which has been so short -levied or part paid or to whom the refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any duty has been levied or has been short -levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any willful mis -statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, the provisions of this sub -section shall have effect as if for the words "one year" and "six months", the words "five years" were substituted:

Explanation: Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of one year or six months or five years, as the case may be.

(1A) When any duty has not been levied or has been short -levied or the interest has not been charged or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful misstatement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter, to whom a notice is served under the proviso to sub -section (1) by the proper officer, may pay duty in full or in part as may be accepted by him, and the interest payable thereon under section 28AB and penalty equal to twenty -five per cent of the duty specified in the notice or the duty so accepted by such person within thirty days of the receipt of the notice.

(2) The proper officer, after considering the representation, if any, made by the person on whom notice is served under sub -section (1), shall determine the amount of duty or interest due from such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined.

Provided that if such person has paid the duty in full together with interest and penalty under sub -section (1A), the proceedings in respect of such person and other persons to whom notice is served under sub -section (1) shall, without prejudice to the provisions of sections 135, 135A and 140, be deemed to be

conclusive as to the matters stated therein:

Provided further that, if such person has paid duty in part, interest and penalty under sub -section (1A), the proper officer shall determine the amount of duty or interest not being in excess of the amount partly due from such person.

(2A) Where any notice has been served on a person under sub -section (1), the proper officer

(i) In case any duty has not been levied or has been short -levied, or the interest has not been paid or has been part paid or the duty or interest has been erroneously refunded by reason of collusion or any wilful mis -statement or suppression of facts, where it is possible to do so, shall determine the amount of such duty or the interest, within a period of one year; and

(ii) In any other case, where it is possible to do so, shall determine the amount of duty which has not been levied or has been short -levied or erroneously refunded or the interest payable which has not been paid, part paid or erroneously refunded, within a period of six months, from the date of service of the notice on the person under sub -section (1).

(2B) Where any duty has not been levied or has been short -levied or erroneously refunded, or any interest payable has not been paid, part paid or erroneously refunded, the person, chargeable with the duty or the interest, may pay the amount of duty or interest before service of notice on him under sub -section (1) in respect of the duty or the interest, as the case may be, and inform the proper officer of such payment in writing, who, on receipt of such information, shall not serve any notice under sub -section (1) in respect of the duty or the interest so paid:

Provided that the proper officer may determine the amount of short -payment of duty or interest, if any, which in his opinion has not been paid by such person and, then, the proper officer shall proceed to recover such amount in the manner specified in this section, and the period of "one year" or "six months" as the case may be, referred to in sub -section (1) shall be counted from the date of receipt of

such information of payment.

Explanation 1. -Nothing contained in this sub -section shall apply in a case where the duty was not levied or was not paid or the interest was not paid or was part paid or the duty or interest was erroneously refunded by reason of collusion or any wilful mis -statement or suppression of facts by the importer or the exporter or the agent or employee of the importer or exporter.

Explanation 2. For the removal of doubts, it is hereby declared that the interest under section 28AB shall be payable on the amount paid by the person under this sub -section and also on the amount of short -payment of duty, if any, as may be determined by the proper officer, but for this sub -section.

(2C) The provisions of sub -section (2B) shall not apply to any case where the duty or the interest had become payable or ought to have been paid before the date on which the Finance Bill, 2001 receives the assent of the President.

(3) For the purposes of sub -section (1), the expression "relevant date" means, -

(a) in a case where duty is not levied, or interest is not charged, the date on which the proper officer makes an order for the clearance of the goods;

(b) in a case where duty is provisionally assessed under section 18, the date of adjustment of duty after the final assessment thereof;

(c) in a case where duty or interest has been erroneously refunded, the date of refund;

(d) in any other case, the date of payment of duty or interest."

13. What we find is that recovery of duties not levied or short levied or erroneously refunded has been brought within the purview of this Act. The section enables the authorities to proceed and deal with cases of non levy, short levy or erroneous refund of duty or non payment of interest, part payment thereof or erroneous refund thereof for any reason other than the reason by collusion or any willful mis-statement or suppression of facts. It then also enables by sub -section (4) to deal with cases where such an Act of omission and commission is with collusion or any

willful mis -statement or suppression of facts and sub -section (4) takes care of those cases. Sub-section (11) has been inserted by Act 14 of 2011 w.e.f. 16th September, 2011 and overrides anything to the contrary contained in any Judgment, Decree or Or.of any Court of law, Tribunal or authority. It empowers all persons appointed as officers of Customs under sub-section 2(4) before 6th July, 2011 as "proper officers" for the purposes of section 28. They also are deemed to be possessing the power of assessment under section 17.

14. In the present case, if the show cause notice has been issued by the Director of Intelligence, then, we have to find as to whether he was competent to do so. In that regard, we have on record the Notification dated 26th April, 1990 Exhibit -I at page 369 of the paper book. That reads as under:

"Notification: 19/89 -Cus. (NT) dated 26 -Apr -1990

Appointment of D. R.I. Officials as Customs Officers

In exercise of the powers conferred by sub -section (1) of Section (4) of the Customs Act, 1962 (52 of 1962), and in supersession of the notification of the Government of India in the Ministry of Finance (Department of Revenue) No. 186 - Cus., dated 4th August, 1981 (as amended), the Central Government hereby appoints the officers mentioned in column (2) of the Table below to be the Collector of Customs, the officers mentioned in column (3) thereof to be Deputy Collectors of Customs, and officers mentioned in column (4) thereof to be Assistant Collector of Customs for the areas mentioned in the corresponding entry in column (1) of the said Table:

A perusal thereof indicates that the same supersedes the earlier Notification dated 4th August, 1981, which itself was a amended Notification. By this Notification, the DRI officials are appointed as Customs Officers and are Collector of Customs. They are appointed for the purposes of the Customs Act, 1962 and in the area mentioned in the corresponding entry. The table is comprehensive. It gives the area/jurisdiction and the description of the officer. Insofar as whole of India is concerned, it designates the Additional Director General, Directorate of Revenue Intelligence, Headquarters, New Delhi to be the Collector of Customs and all

Deputy Directors posted at Headquarters to be the Deputy Collectors and etc. Insofar as the State of Maharashtra, Gujrat, Madhya Pradesh etc., it is the Additional Director General, Directorate of Revenue Intelligence, Bombay, who is a Customs officer. Nothing contrary to the above having been brought to our notice, we do not see any force in the contention of Mr. Singh that the Additional Director General was incompetent to issue the show cause notice. There is no force in the argument that despite such Notification and the subsequent one issued on 6th July, 2011, the Central Government and the Board have not entrusted or assigned the functions of the proper officer to this Additional Director. Now, the further Notification at page 373 of the paper book proceeds to assign the functions of the proper officer to Additional Director General of this Directorate. In these circumstances and when section 17 and 28 are specifically referred to in the Notification at page 373, then, we do not see any force in the argument of the Petitioner that the DRI was not competent to issue the subject show cause notice. The Notifications clearly indicate that the officers of this directorate have been entrusted or assigned the functions of the Customs Officers for the purpose of these sections. They could have therefore set the law in motion.

15. There is no need to decide any wider question or controversy after these Notifications, which have been brought to our notice. That apart, we do not find any force in the argument of Mr. Singh that though sub -section (11) has been inserted in the statute book w.e.f. 16th September, 2011 and section 28 has been amended accordingly, the Explanation 2 is a explanation and for the entire section. He submits that the same clarifies that it is only those officers who are proper officers within the meaning of section 2(34) who could deal with the cases governed by section 28.

16. We have found that section 28(11) was inserted by Act 14 of 2011 w.e.f. 16th September, 2011. That alters the basis of the Judgments, which have been delivered by any Court of law, Tribunal or other authority. Once this section says that all persons appointed as officers of Customs under section 1(4) before 6th July, 2011 shall be deemed to have been and always to be the proper officers for the purpose of this section, then, the Notifications, which are referred by us above at page 369 and 373 of the paper book are specifically saved and validated. They

have been given a retrospective effect. These Notifications were holding the field and were not quashed or set aside. In the teeth of such Notifications, the legislature stepped in to clarify the position that if the functions of the Customs officer can be entrusted or assigned by the Central Government or the Board in terms of section 6 of the Customs Act, 1962, then, all such Notifications, have been validly issued and enforced. They enable the parliament to clarify that the officers mentioned therein shall be deemed to be the proper officers for the purposes of section 17 and 28 of the Act. Precisely, that has been done in the instant case.

If that has been done, then, no assistance can be derived from the Judgment of the Hon'ble Supreme Court in the case of Sayed Ali (supra). There, for want of jurisdiction or competence in the Collector of Customs (Preventive), the show cause notice was quashed by the Tribunal and that order was upheld by the Supreme Court. Before us, the issue is not whether any Collector of Customs (Preventive) could be said to be on par with the officers mentioned in the earlier Notification dated 26th April, 1990. The assignment of functions to these officers, who were earlier carrying on preventive work came w.e.f. 6th July, 2011. That Notification was not, at the relevant time, given retrospective effect. It is in such circumstances that the Hon'ble Supreme Court held that in terms of the Notifications, which were issued and holding the field, not designating the Collector of Customs (Preventive) as a proper officer for the purpose of section 28 as it then stood, he was not competent to issue show cause notice (see para 24 of Sayed Ali's Judgment). This position has now undergone a change and from 6th July, 2011, admittedly, they have been assigned these functions and of the Custom officers. They are therefore competent and the Notification in that behalf at page 373 of the paper book has been given a retrospective effect. It is not the argument of Mr. Singh that the law cannot be amended retrospectively. It is also not his argument that the validating Act does not validate anything which may be or is invalid. In the circumstances and the Parliament being competent to make such a law, we find no force in the arguments canvassed before us. Once the above view is taken, then, no reference is required to be made to the other Judgments cited by both Mr. Singh and Mr. Jetly.

17. As a result of the above discussion and finding that Explanation 2 has not been dealing with the case, which was specifically dealt with by sub -section (11) of Section 28 of the Act, that we are of the opinion that the challenge in the Writ Petition is without any merit. The Explanation removes the doubts and states that even those cases which are governed by section 28 and whether initiated prior to the Finance Bill 2011 receiving the assent of the President shall continue to be governed by section 28, as it stood immediately before the date on which such assent is received. The reference to Finance Bill therein denotes the bill by the section itself was substituted by Act 8 of 2011 w.e.f. 8th April, 2011. Prior to this Bill by which the section was substituted receiving the assent of the President of India, some cases were initiated and section 28 was resorted to by the authorities. The Explanation 2 clarifies that they will proceed in terms of the un-amended provision. The position dealt with by insertion of section 28(11) is distinct and that is about competence of the officer. The officers namely those from the Directorate of Revenue Intelligence having been entrusted and assigned the functions as noted above, they are deemed to have been possessing the authority, whether in terms of section 28 un -amended or amended and substituted as above. In these circumstances, for these additional reasons as well, the challenge to this sub - section must fail.

18. As a result of the above discussion, the Writ Petition is dismissed.

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