Sai enterprises Vs. Customs Central Excise and Service Tax Settlement Commission and Others

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SooperKanoon Citation : sooperkanoon.com/1190592

Court : Chennai

Decided On : Jun-10-2016

Judge : T.S. Sivagnanam

Appeal No. : W.P. Nos. 12794 & 12795 of 2015

Appellant : Sai enterprises

Respondent : Customs Central Excise and Service Tax Settlement Commission and Others

Judgement :

(Common Prayer :- This Writ Petitions are filed under Article 226 of the Constitution of India, seeking for a Writ of Certiorarified Mandamus to call for the records pertaining to impugned order No.35/2014-Cus., dated 29.12.2014, passed by the first respondent in S.A.Cus.18-19/2014-S.C., in sofar as the petitioner is concerned and to quash the same and further direct the first respondent herein to re-hear and dispose of the above Settlement Application filed before them by the petitioner herein on merits after affording an opportunity of Personal Hearing by furnishing the documents requested by the petitioner.)

1. Heard Mr.A.K.Jayaraj, learned counsel appearing for the petitioner and Mr.A.P.Srinivas, learned Senior standing counsel appearing for the respondents

and with their consent, the Writ Petitions are taken up for final disposal.

2. The petitioner in W.P.No.12794 of 2015 is a proprietary concern managed by its Proprietor Mr.C.Manoharan, who is petitioner in W.P.No.12795 of 2015 in his individual capacity and the challenge in both the Writ Petitions are to the common order passed by the Settlement Commission under the Customs and Central Excise Act. The Directorate of Revenue Intelligence issued a show cause notice, dated 13.04.2013, to the petitioners herein as well as to a private limited company under the name and style of M/s.Nitish Tools Private Limited and Smt.M.Thenmozhi and M/s.Rukmani Explosives. Smt.M.Thenmozhi is the wife of Mr.C.Manoharan, (Petitioner in W.P.No.12795 of 2015) and she is the Managing Director of M/s.Nitish Tools Private Limited. M/s.Rukmani Explosives, who is also one of the noticees, is not a party in these Writ Petitions. The notice alleged under valuation of carbide tips and hollow drill rods imported by Nitish Tools Private Limited and the petitioner in W.P.No.12794 of 2015, Shree Sai Enterprises. After setting out the facts, it was proposed to reject the value of the carbide tips and hollow drill rods as mentioned in the bills of entry and differential duty was demanded with proposal to impose penalty. On receipt of the show cause notice, all the four noticees except M/s.Rukmani Explosives, filed separate applications before the Settlement Commission on 26.03.2014 under Section 127B of the Customs Act, 1962 (Act). The applications were numbered as S.A.(Cus) No.15 to 19/2014-SC. The receipt of the applications were acknowledged by the office of the Settlement Commission vide acknowledgement, dated 26.03.2014. Thereafter, by proceedings, dated 02.04.2014, a notice was issued to the petitioner calling upon him to explain and to state whether the applications contained full and true disclosure of the manner in which additional duty liability has been derived as required under Section 127B of the Act and also fulfils all the criteria under Section 127B of the Act and in particular whether any case is pending in the Appellate Tribunal or any Court. The petitioner through their counsel sent a reply on 07.04.2014, wherein among other things, the petitioner stated that no appeal pertaining to the show cause notice against which the Settlement Application has been filed, is pending before any Appellate Authority or Tribunal or Court and this is the first time, the petitioner has approached the Settlement Commission. Based on such communication, the Commission by letter dated 10.04.2014, intimated the

petitioner that the Hon'ble Bench has allowed the application to be proceeded with as per the amended provisions of Section 127C of Act. After about four months i.e., even before the matter could be proceeded with, a communication was sent to the counsel for the petitioner from the Commission, dated 28.08.2014, stating that the Commissioner of Customs by letter dated 24.07.2014, has brought to the notice of the Commission that CBI has registered a case against the petitioner and others and the matter has been taken cognizance by the Competent Court. Therefore, the Bench called upon the petitioner to offer specific comments on the maintainability of the application in terms of second proviso to Section 127B(1) of the Act. The petitioners sent a reply through their counsel dated 09.09.2014 that after filing of the Settlement Applications before the Commission and after they were admitted, thereafter, only CBI had issued summons to the petitioners and they had appeared and they made their submissions. It was further stated that the matter has not been filed nor pending in any other Court and hence, the applications filed by the petitioners and others are not hit in terms of the second proviso to Section 127B(1) of the Act. Thereafter, the Commission sent a notice dated 23.10.2014 fixing the date of hearing as 13.11.2014. Three days prior to the date of hearing, the petitioner through their counsel sought for adjournment on the ground that the petitioner C.Manoharan, is taking treatment for Spondylitis and requested the Commission to adjourn the matter. The next hearing date was fixed after more than one month on 19.12.2014. One day prior to the hearing date, the Petitioner M/s.Shree Sai Enterprises submitted a letter requesting for postponement of the personal hearing. The Commission declined to consider the said request and proceeded to consider the matter and by order, dated 29.12.2014, held that due to lack of cooperation on the part of the applicant, the matter has to be sent back to the Commissioner of Customs for adjudication. This order is impugned in these Writ Petitions.

3. The learned counsel appearing for the petitioner submitted that the Commission without affording opportunity to the petitioner and without taking into consideration the facts and circumstances, erroneously passed the impugned order and prayed that the order be set aside and the matter may be remanded back to the Commission. It was the endeavour of the learned counsel appearing for the petitioner to convince this Court that the said application for settlement having

been allowed to be proceeded with and intimated to the petitioner on 10.04.2014, it has to be seen as to whether there was any matter pending before any Court or Tribunal on the said date and admittedly, on such date, no matter was pending before any Court or Tribunal. Therefore, it is submitted that the Commission ought not to have sent back the matter to the Commissioner of Customs for adjudication, more so, when the petitioner has admitted the duty liability and deposited substantial amount of duty. Further, it is submitted that the observations made by the Settlement Commission are not tenable and the petitioner had no opportunity to rebut the report submitted by the Commissioner, since they had no notice of such a report and were aware of it, only when they perused the impugned order and found that in paragraph 6.5, the report submitted by the Revenue has been taken note of by the Commission. On the above grounds, the learned counsel submits that the matter may be remanded to the Commission for fresh consideration.

4. The learned Senior Standing counsel appearing for the respondent Department submitted that the Writ Petition is covered by the decision of this Court in the case of Nitish Tools Private Limited vs. Cus.,C.EX.S.T.SETT.Commission, Chennai reported in 2015 (325) ELT 35 (Mad), filed by one of the noticees namely, Nitish Tools Private Limited represented by its Managing Director Mrs.M.Thenmozhi, wife of Mr.C.Manoharan and the issue is identical except the fact that separate applications before the Commission, were filed and all arising out of the same show cause notice, dated 13.04.2013. In the said case also, the Commission passed similar order and sent back the matter to the Commissioner of Customs for adjudication by passing the order dated 29.12.2014 and the only difference being the change of cause title and the application numbers and consignment details and therefore, these Writ Petitions are also liable to be dismissed. It is further submitted that in the criminal case, final report has been submitted on 18.12.2014 and it has also been taken on file by the Special Court well before the matter could be heard by the Commission and therefore, the Commission rightly send back the matter for adjudication.

5. Section 127B of the Act deals with Application for Settlement of cases , which reads as follows:-

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 :

6. In terms of the above provision in an application filed under Section 127B of the Act, the applicant is required to make a full and true disclosure of his duty liability, which he had failed to disclose before the proper officer, he is required to explain to the Settlement Commission, the manner in which such liability has been incurred; the additional amount of customs duty accepted to be payable by him as also the price of such dutiable goods in respect of which he admits short levy on account of mis-calculation or otherwise. Section 127C of the Act prescribes the procedure to be followed by the Settlement Commission on receipt of the application under Section 127B of the Act. It is required to call for a report from the Commissioner of Customs having jurisdiction and on the basis of the materials contained in such report and having regard to the nature and circumstances of the case or the complexity of the investigation involved, the Commission may allow the application to be proceeded with or rejected the application. Section 127E empowers the Commission to reopen the completed proceedings in appropriate cases, while Section 127F confers the powers upon the Commission which are vested in an officer of the Customs under the Act and in terms of Section 127H, the Commission can grant immunity from penalty and prosecution with or without condition, when it is satisfied that the applicant has made a full and true disclosure of his duty liability. In terms of Section 127I, the Settlement Commission can send back the matter to the proper officer, where it finds that the applicant is not co-operating with it. Thus, the scheme of the act gives wide discretionary powers to

the Settlement Commission to examine a case, where there is full and true disclosure. That apart, the applicant's conduct in extending cooperation to proceed with the matter before the Commission has been given priority, as a separate Section namely Section 127I empowers the Commission to send back the matter to the proper officer, where it finds the applicant is not cooperating. Therefore, when a Commission records a finding based on facts and taking note of the conduct of the applicant that he is not cooperating in the disposal, the High Court while exercising jurisdiction under Article 226 should be slow in upsetting or interfering with such finding.

7. The window given under the Customs Act by inserting chapter XIVA by Finance Act 1998, is to give a reprieve to an applicant who comes forward before the Commission by making full and true disclosure and this Commission was set up on similar lines, as that of the Commissions already functioning under the Income Tax Act. On a perusal of the facts as set out in the impugned order as well as on perusal of the materials placed on record, it is evidently clear that the petitioner failed to cooperate in the disposal of the matter.

8. As already pointed out, the Commission acknowledged the receipt of the applications filed on 26.03.2014. Immediately thereafter, that is within a period of about one week, notice for proceeding with the application was sent to the petitioner calling upon him to answer various queries one among them was whether any case is pending in the Appellate Tribunal or any Court. The reply which is expected to be given by an applicant is a simple Yes or No . In the event, if the reply is Yes , he has to disclose about the case, which is pending. However, the reply given by the petitioner is not a straight forward reply, but by stating that pertaining to the show cause notice, which is subject matter of settlement application, no appeal has been filed, is pending before the Appellate Authority or Tribunal or Court and this is the first time, the petitioner has filed the Settlement Application before the forum. The reply given obviously does not answer the specific query in a direct fashion.

9. Be that as it may, the Commission allowed the matter to be proceeded with and sent notice dated 10.04.2014. It is thereafter, the Commission was informed about

the case registered by CBI against all the noticees. Therefore, the petitioner was called upon to furnish his comments on the maintainability of the application. The petitioner admitted that CBI had issued summons, but stated that no case is pending in any other Court. The Commission did not pass any orders either specifically accepting the petitioner's plea or otherwise, but fixed the date of hearing on 13.11.2014. Therefore, if the petitioner was really interested in prosecuting the matter, he ought to have appeared before the Commission on the date so fixed. However, one day before the hearing, a letter of adjournment was circulated citing that the petitioner Mr.Manoharan is suffering from Spondylitis and therefore, adjournment should be granted. The Commission graciously accepted the prayer and granted more than one month time and fixed the hearing on 19.12.2014. Once again, the same modus was adopted by the petitioner and one day before the hearing sought for an adjournment and curiously enough in the letter requesting adjournment, the petitioner called upon the Commission to instruct the DRI to give copies of documents which were seized by DRI and until the same is received by them, the Commission should postpone the hearing. The letter dated 18.12.2014, given by the petitioner to the Commission makes it manifestly clear that the petitioner had no intention to co-operate with the disposal of the matter by the Commission. Therefore, the Commission after recording elaborate reasons held that the facts and circumstances clearly show lack of cooperation. There is no valid ground made out by the petitioner to interfere with such a finding. That apart, identical order as impugned in this Writ Petition was tested before this Court by none other than the petitioner's spouse in the capacity of the Managing Director of the private limited company which was also a co-noticee to the show cause notice, dated 13.04.2013 and the Court dismissed the Writ Petition and the said order has become final. As of now, the case has been registered by the CBI and it is now pending before the Special Court.

10. Hence, for all the above reasons, the petitioner has not made out any case to interfere with the impugned order passed by the Commission. Accordingly, the Writ Petitions fail and they are dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.