(2012) 12 DEL CK 0084

In the Delhi High Court

Case No : Writ Petition (C) No. 5894 of 2012

Anita Grover APPELLANT

Vs

Commissioner of Central Excise and Others RESPONDENT

Date of Decision : 03-12-2012

Acts Referred:

Central Sales Tax Act, 1956 — Section 18
Constitution of India, 1950 — Article 14, 21, 265, 300A
Customs Act, 1962 — Section 142, 28B
Income Tax Act, 1961 — Section 179

Citation : (2013) 5 AD 408 : (2013) 196 DLT 598 : (2013) 288 ELT 63 : (2013) 22 GSTR 264

Hon'ble Judges : S. Ravindra Bhat, J;R.V. Easwar, J

Bench : Division Bench

Advocate : Sandeep Sethi, with Mr. Ruchir Bhatia, for the Appellant; Sonia Sharma with Mr. V.C. Jha, Advocates for Central Excise and Mr. Abhay Raj Varma for Mr. Najmi Wajiri, Advocate for R-5, for the Respondent

Final Decision : Allowed

Judgement

Mr. Justice S. Ravindra Bhat

1. In this writ petition, the petitioner impugns the notices dated 3.8.2012 and 8.8.2012 issued by the second Respondent, and notice dated 7.8.2012 issued by the third Respondent. The relevant facts are that the petitioner was a director in the company "Shri Ram Casting P. Ltd" (hereafter "the company"), and she resigned from the Board of the company on 2.4.1993. The petitioner was the owner of 3 properties viz. (i) Pitam Pura property, (ii) Wazirpur property and (iii) Mukherjee Nagar property. She first received the impugned notice dated 3.8.2012 (addressed to the company, copy sent to her) wherein she was informed that government dues under the Customs Act, 1962 (hereafter "the Act") amounting to Rs. 74,78,225/- along with interest were to be recovered from the company, and that if the amount was not paid within prescribed period, steps would be taken in accordance with the provisions of the Customs

(Attachment of Property Defaulters for the Recovery of Government Dues) Rules 1995 (hereafter "the Rules"). By the second notice dated 7.8.2012, the Sub-Register concerned in respect of the three abovementioned properties was directed that the said properties which belonged to the company may not be allowed to be disposed of/transferred without the consent of the Respondent. The third notice dated 8.8.2012 (this time addressed to the petitioner) mainly repeated the contents of the first notice. In the meanwhile, the petitioner, out of had sought to transfer by way of gift the Wazirpur property in favour of her sons, but she was informed by the sub-registrar that since certain proceedings for recovery of government dues were pending against the said property, the same could not be allowed to be transferred/disposed of. The petitioner has therefore filed the present petition praying for quashing of the three notices.

2. The case of the petitioner was that she, and not the company, is the owner of the three properties. She resigned from the company in 1993. The properties were incorrectly described in the notice dated 7.8.2012 as belonging to the company. It was argued that after her resignation from the Board of the company, there is no question of any proceedings being started against her property for attachment of amounts due from the company. Petitioner''s counsel relied on the definition of "defaulter" as provided in the Act to contend that in the present case, the recovery of pending dues can only be from the company. It was also submitted that in the absence of any provision enabling recovery of the amounts due from a customs duty defaulter, from a third party, and in the absence of any proper proceeding putting such third party to notice about the proposed adverse order, and fair opportunity to respond to it, the recovery of such amounts is illegal and without authority of law.

3. Counsel for the Customs authorities did not dispute that the Petitioner is owner of the properties, and that the tax defaulter in this case was the company. However, it was argued that as director, the petitioner could not distance herself from the company''s acts and omissions; she had to shoulder its liabilities. It was in furtherance of such obligation that the authorities acted within their jurisdiction in issuing the impugned notice, and informing the Sub-Registrar not to register any transfer or alienation of the petitioner''s properties, which could satisfy the duty liability of the company.

4. The provisions from the Act and the Rules relevant for addressing the issue are extracted hereunder:

Section 142

(1) Where any sum payable by any person under this Act including the amount required to be paid to the credit of the Central Government u/s 28B is not paid,--

* * *

(c) if the amount cannot be recovered from such person in the manner provided in clause (a) or clause (b)-

(ii) the proper officer may, on an authorisation by a Commissioner of Customs and in accordance with the rules made in this behalf, distain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus, if any, to such person.

Provided that where the person (hereinafter referred to as predecessor), by whom any sum payable under this Act including the amount required to be paid to the credit of the Central Government u/s 28B is not paid, transfers or otherwise disposes of his business or trade in whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by the proper officer, after obtaining written approval from the Commissioner of Customs, for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.

The Relevant Rules:

Rule 2:

(ii) ''Government dues'' means any duty or drawback to be recovered from any person or any interest or penalty payable by any person under the Act and has not been paid.

(vi) ''Defaulter'' means any person from whom government dues are recoverable under the Act.

RULE 3. Issue of Certificate.-Where any Government dues are not paid by any defaulter, the Assistant Commissioner of Customs or Deputy Commissioner of Customs may prepare a Certificate signed by him specifying the amount due from such person and send the same to the Commissioner having jurisdiction over the place in which the defaulter owns any movable or immovable property or resides or carries on his business or has his bank accounts.

RULE 4. Issue of Notice.-On receipt of the Certificate mentioned in rule 3 above, the Commissioner may authorise any officer subordinate to him to cause notice to be served upon the defaulter requiring the defaulter to pay the amount specified in the Certificate within seven days from the date of the service of the notice and intimate that in default, such subordinate officer is authorised to take steps to realise the amount mentioned in the Certificate in terms of these rules.

RULE 5. Attachment of property.-If the amount mentioned in the notice issued in terms of the preceding rule is not paid within seven days from the date of service of this notice, the Proper Officer may proceed to realise the amount by attachment and sale of defaulter''s property. For this purpose, the proper officer may detain the defaulter''s property until the amount mentioned in the Certificate together with the cost of detention is paid by the defaulter.

5. The above provisions make it clear beyond doubt that it is only the defaulter against whom steps may be taken under Rules. The defaulter is the person from whom dues are recoverable under the Act, which in the present case undoubtedly is the company. There is no averment that the company has been or is being wound up. In that case, there cannot be any question about the separate juristic personality of an existing company and its former director; the dues recoverable from the former cannot, in the absence of a statutory provision, be recovered from the latter. There is no provision in the Customs Act, 1962 corresponding to Section 179 of the Income Tax Act, 1961 or Section 18 of the Central Sales Tax, 1956 which enable the revenue authorities to proceed against directors of companies or such like third parties who are not defaulters.

6. In Union of India and others Vs. Manik Dattatreya Lotlikar, , the Bombay High Court held that the directors of any company, whether public limited or private, are not personally liable for the debts of the company unless the Company Court finds them guilty of any misfeasance or wrongs. In G.C. Malhotra v. Deputy Collector (1998) 110 STC 406 (All), the Court held that in case of a private company, recovery of tax dues from it cannot be made from its directors, unless permitted by specific provisions of the law or by an agreement between the parties. In Mukesh Gupta v. State of Haryana (1996) 8 PHT 326 (P&H), the Punjab and Haryana High Court examined held that a director was not liable personally for the amount due towards arrears of sales tax from the company. This view was reiterated by this Court in Suneet Khurana v. Assistant Collector (1997) 10 PHT 495 (P&H).

7. In Om Prakash Walecha v. State of Haryana, 2009 (238) ELT 0215 (P & H) the Punjab and Haryana High Court upheld the assessee''s contention that no recovery either of Haryana General Sales Tax or Central Sales Tax could be effected personally from the Director in respect of the liability of the Company. Again, this view was followed in A.P. Raheja and Another v. State of Haryana And Others (2010) 29 VST 103 (P&H). To end the discussion, the decision of the Kerala High Court, in Nishad Patel & Anr. Vs. State of Kerala & Ors. (1999) 96 Comp Case 861 (Ker) requires to be noticed. In that case, it was held that:

In the present case what respondents Nos. 3 to 5 seek to recover is arrears of sales tax allegedly due from Alliance Leathers (P.) Ltd. The petitioners are only the directors of the said company as already noted. They have in their possession no assets of the company whatsoever. As such, they have no personal liability in respect of the dues allegedly due from the company. It is by now well-settled that a director of a company cannot be proceeded against for recovery of arrears of any amount due from the company as already noticed. Therefore, the present proceedings initiated against the petitioners for recovery of sales tax arrears allegedly due from the company is totally without jurisdiction. Moreover, the present proceedings of respondents Nos. 3 to 5 are violative of the principles of natural justice and the fundamental rights of the petitioners guaranteed under articles 14 and 21 of the Constitution of India. No notice whatsoever has been issued to the petitioners before coercive action was initiated which will result in arrest and detention of the petitioners u/s 23(2)(b) of the Kerala General Sales Tax Act, 1963. As such, the said action of respondents Nos. 3 to 5 are totally unsustainable.

8. The Court is of opinion that the impugned notices and action of the Customs authorities is at once in utter violation of Article 265 of the Constitution, as it seeks to recover tax dues of one from another, without authority of law. It also amounts to illegal deprivation of the petitioner''s property, without authority of law, under Article 300A of the Constitution of India. In view of the above discussion, the petition must succeed. The impugned notices dated 3.08.2012, 7.8.2012 and 8.8.2012 are hereby quashed. The Writ Petition is allowed in the above terms.