(2011) 07 AHC CK 0010

In the Allahabad High Court

Case No : Writ Tax No. 1663 of 2010

Arun Kumar Sawhney and Another — APPELLANT

Vs

State of U.P. and Others — RESPONDENT

Date of Decision : 27-07-2011

Acts Referred:
Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15
Uttar Pradesh Trade Tax Act, 1948 — Section 8

Citation : (2013) 58 VST 241

Hon'ble Judges : Sunil Ambwani, J;Pankaj Mithal, J

Bench : Division Bench

Advocate : Ashok Kumar and Praveen Kumar, for the Appellant;

Final Decision : Allowed

Judgement

1. We have heard Sri Praveen Kumar, learned counsel for the petitioner. Learned standing counsel appears for the respondents. Sri Arun Kumar Sawhney, S/o. Late Dharam Bir Sawhney and Sri Kailash Nath Agarwal, S/o. Late Sri Kundan Lal Agarwal, as directors of M/s. Rajinder Alloys Ltd., District Kanpur--a public limited company, with its registered office at "Tube House", 79/21 Latouch Road, Kanpur, have challenged the recovery of trade tax dues against the company and the notices served upon on them on March 28, 2004 for the assessment year 1999-2000.

2. A sum of Rs. 3,78,544 and further sum of Rs. 5,95,698 and interest from February 6, 2002 at 18 per cent per annum is sought to be recovered vide recovery notice by attachment, sale or arrest of the petitioners as directors of the company.

3. Sri Praveen Kumar, learned counsel for the petitioners, submits that the company suffered business losses, and referred itself for registration as a sick industrial company u/s 15 of the Sick Industrial Companies (Special Provisions) Act, 1985, with the Board of Industrial and Financial Reconstruction (BIFR). The

company was registered as Case No. 159 of 1997. The BIFR, after making enquiries, found that there are no chance of rehabilitation, and referred it for winding up to the High Court. The company filed an appeal before the Appellate Authority for Industrial and Financial Reconstructions (AAIFR). We are informed that the AAIFR registered the appeal as Case No. 216 of 2004, and remanded the matter back to the BIFR. It is stated in para 3 of the writ petition that the matter of rehabilitation of the company is pending before the BIFR, and the next date fixed by the BIFR was March 24, 2011. The counsel appearing for the petitioners is not aware about the current status of the proceedings.

4. It is submitted that the trade tax dues against a public limited company cannot be recovered from its directors, unless and until there are allegations of playing fraud or taking advantage of the corporate personality for immoral, illegal or other purpose which is against public policy. It is submitted that section 8 of the U.P. Trade Tax Act, 1948, does not provide for any recovery of trade tax against the directors of a public limited company.

5. The petitioners have relied upon decision in Meekin Transmission Ltd. and Purushottam Sootwala Vs. State of Uttar Pradesh and Others, , in which this court considered the circumstances in which the doctrine of lifting of corporate veil can be invoked for making recoveries of the trade tax dues from the directors of the company.

6. It is submitted by the counsel for the petitioners that no investigation has been carried out to ascertain the circumstances necessary for lifting of corporate veil and for reaching to a conclusion that the petitioners-directors of the company are hiding behind mask, to avoid the recoveries. There is no such averment in the counter-affidavit that the petitioners have played fraud, to initiate proceedings against them.

7. In paras 4, 7 and 8 of the counter-affidavit, filed in the connected writ petition No. 494 of 2004 it is stated that trade tax dues can be recovered from the directors, who act for the company behind the corporate veil. In the counter-affidavit, Sri R.C. Gaur, Deputy Commissioner (Assessment) 9th, Trade Tax, Kanpur, has relied upon the decision in Naresh Chander Gupta''s case (2003) 22 NTN 358, to defend the proceedings of recovering trade tax dues. The case in Naresh Chander Gupta v. District Magistrate (2003) 22 NTN 358, relates to a society registered under the Societies Registration Act.

8. We do not find that any investigation was carried out by the Trade Tax Department, in arriving at a conclusion that the petitioners, as directors of a public limited company, are liable to pay dues of the company.

9. The directors of a public limited company, as member of the Board of Directors of the company are running and managing the company for the shareholders, who are the ultimate owners of the company. The shareholders are protected from the liability of the company under which the company was formed as public limited company.

10. The Supreme Court in Purshottam Das Beriwal, Kanpur v. Deputy Collector (Collections) Sales Tax (1989) UPTC 456 held that:

...The cardinal principle of law is that when there is a liability against a company, no recovery can be made from personal assets of its director, unless it is specifically provided in the statute or warranted by law. It is not brought to our notice that there is any specific provision in the U.P. Sales Tax Act, whereunder recovery of the liability outstanding against a company can be made against the personal assets of its director.

11. In Meekin Transmission Ltd. and Purushottam Sootwala Vs. State of Uttar Pradesh and Others, , this court had occasion to consider judgments of Division Bench of the court in Naresh Chander Gupta''s case (2003) 22 NTN 358 and Adesh Kumar Jain and Others Vs. U.P. State Electricity Board and Others, . It was held that the judgment in Naresh Chander Gupta (2003) 22 NTN 358 cannot be said to be a precedent for holding that whenever the tax dues are to be recovered from a company, its director would be personally responsible even though there is no such provision in the relevant statute. In Adesh Kumar Jain and Others Vs. U.P. State Electricity Board and Others, , electricity dues were sought to be recovered from him. It was held in that case that:

...In the instant case, there is an agreement between the parties and also the statutory provisions under which the only consumer company is liable for payment of the arrears of electricity dues and the director of company cannot be made personally liable. Hence the doctrine of lifting the veil cannot be invoked in the instant case...

12. Paras 77 and 78 in 36 NTN 107 (paras 80, 81 in 58 VST 201) of the judgment in Meekin Transmission Ltd. (2013) 58 VST 201 (All); (2008) 36 NTN 107, relevant for the purposes, are quoted as under (pages 234 & 235 in 58 VST):

77. In the nutshell, the doctrine of lifting of veil or piercing the veil is now a well established principle which has been applied from time to time by the courts in India also. There is no doubt about the proposition that whenever the circumstances so warrant, the corporate veil of the company can be lifted to look into the fact as to whose face is behind the corporate veil, who is trying to play fraud or taking advantage of the corporate personality for immoral, illegal or other purpose which are against public policy. Such lifting of veil also has to be implemented whenever a statute so provided. However, it is not a matter of routine affair. It needs a detailed investigation into the facts and affairs of the company to find out as to whether the veil of the corporate personality needs to be lifted in a particular case. After lifting the veil, in a case where it is so required, it is not always that the directors would automatically be responsible but again it is a matter of investigation as to who is/are the person/s responsible and liable who had occasioned for application of said doctrine.

Initial burden for application of the doctrine of ''piercing of veil'':

78. Whether in respect to tax dues or other public revenue or in other cases, if one has to discard the corporate personality, then the initial burden would lie upon it to place on record relevant material and facts to justify invocation of doctrine of lifting of veil and to plead that the corporate shell be not made a ground of defence. A personality conferred by the statute cannot be overlooked or ignored lightly and in a routine manner or on a mere asking. In fact whenever the veil is to be pierced, it would mean that somebody, individual or group of individuals, have obtained the shell of corporate personality as a pretext or mask to cover up a transaction or intention of those individual/individuals is neither legal nor otherwise in public interest. In effect the attempt of those individuals has to be shown akin to fraud or misrepresentation. The legal personality of the corporate body thus can be ignored in such cases since it is well-settled that fraud vitiates everything and, therefore, the benefit of legal personality obtained by someone for purposes other than those which are lawful or even if lawful but not otherwise permissible, the corporate personality being the result of such fraudulent activity would have to be discarded but not otherwise. These are the things based on positive factual material and cannot be presumed in the absence of proper pleadings and material to be placed by the person who is pleading to invoke the doctrine of piercing the veil and to ignore the juristic personality of the corporate body. Once relevant material is made available by the authority or person concerned, thereafter it would be the responsibility of the other side to place material to meet the aforesaid facts but the mere fact that the company has failed to pay the Government dues or pubic revenue, that by itself would not invite the doctrine of piercing the veil and is not sufficient to ignore the statutory corporate personality conferred upon a company and make its directors or shareholders responsible personally.

13. In the present case, the company was declared as a sick company under the provisions of the Sick Industrial Companies (Special Provisions) Act, 1985. The findings necessary, to proceed against the assets of the directors of the company for lifting of corporate veil, would have required investigation into the affairs of the company.

14. In the aforesaid facts, the writ petition is allowed. The impugned notice dated March 28, 2004 for the assessment year 1999-2000 for recovery of trade tax dues is quashed to the extent that recovery be not forced against the assets of the directors of the company. It will be open to the Department to proceed against the assets of the company, or apply before the BIFR where the proceedings are still pending. It will also be open to the Department to carry out investigation to find out if the directors of company have played any fraud, and the circumstances necessary for lifting of corporate veil are available, before proceeding to recover the trade tax dues for them.