
(2012) 12 KL CK 0069

In the High Court Of Kerala

Case No : Writ Petition (C) No. 28292 of 2011

Brijeesh Mohammed and Another

APPELLANT

Vs

Deputy Commissioner of Customs and Others

RESPONDENT

Date of Decision : 20-12-2012

Acts Referred:

Customs Act, 1962 — Section 142, 142(1), 142(1)(c), 142(1)(c)(ii), 28(2)
Transfer of Property Act, 1882 — Section 53

Citation : (2013) 2 RCR(Civil) 370

Hon'ble Judges : A.M. Shaffique, J

Bench : Single Bench

Advocate : C.K. Karunakaran, T.P. Lekshmi and V. Vinay, for the Appellant; Thomas Mathew Nellimoottil, SC, P. Parameswaran Nair, ASG of India and Madhu Ben, GP, for the Respondent

Final Decision : Allowed

Judgement

A.M. Shaffique, J.—Both these writ petitions involve the challenge in respect of notice issued by the Deputy Commissioner of Customs (Preventive) to the Sub-Registrar office, Vadakkancherry under Rule 9 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues (Rules 1995) (hereinafter referred as the Rules), requesting the Sub Registrar not to allow mortgage, charge, lease or otherwise deal with the properties described in the said document without permission from the proper officer. Ext. P8 in W.P. (C) No. 28292/2011 and Ext. P4 in W.P. (C) No. 31429/2011 are the said notices. Since the challenge in the writ petitions is with reference to the same notice the writ petitions are disposed together. The exhibits referred hereunder are as shown in W.P. (C) No. 28292/2011 unless otherwise stated. Petitioners in both the writ petitions are commonly referred as Petitioners unless otherwise stated. W.P. (C) No. 28292/2011 is filed by the children of late Sri. Aboobacker and W.P. (C) No. 31429/2011 is filed by the wife of the aforesaid Aboobacker against whom the Department had imposed anti-dumping duty for a sum of Rs. 97,35,379/-.

2. The facts involved in the case disclose that M/s. Malabar Enterprises imported CF lambs into India from China and the goods were cleared as per bill of entry dated 28.12.2001. In the meantime, it was noticed that Govt. of India had issued notification No. 128/2001 dated 21.12.2001 imposing anti-dumping duty on such imports. Without noticing the above notification, the goods were cleared by the aforesaid Aboobacker as Proprietor of Malabar Enterprises after paying customs duty of Rs. 6,93,073/-.

3. When the fact regarding non-levy of antidumping duty was noticed by the Department, they issued show cause notice and after considering the same, orders were issued for imposing a duty of Rs. 97,35,379/- under S. 28(2) of the Customs Act, 1962. The said demand had become final and there is an obligation on the part of the aforesaid Aboobacker to pay the said amount.

4. Since the aforesaid payment had not been paid by the aforesaid Sri. Aboobacker Ext. P8 came to be issued.

5. According, to the petitioners, the property described in Ext. P8 does not belong to the said Aboobacker and it is the private property of the petitioners. According to them, their private properties cannot be the subject matter of any recovery of dues payable by Aboobacker as Proprietor of M/s. Malabar Enterprises.

6. The Department has filed counter affidavit inter alia contending that though certain items of properties are purchased in the name of the petitioners, the same are purchased with the income derived by Sri. Aboobacker, who was a business man and therefore the properties actually belongs to Aboobacker and for that reason they are entitled to proceed against the said properties. It is also stated that as on 31.12.2011, the total amount due with interest is Rs. 2,14,50,641/-. It is further stated that Ext. P1 property was purchased in the name of the petitioners while the children were minors. Ext. P2 property was transferred by Aboobacker to the first petitioner in W.P. (C) No. 28292/2011 after the demand notice for short levy of customs duty. Ext. P3 property was also purchased in the name of the first petitioner while he was a student. Similarly, Ext. P4 property was purchased jointly in the name of the first petitioner when he was a student. Ext. P5 property was purchased jointly in the name of the petitioners. According to the Department Exts. P3, P4 and P5 properties were purchased after the receipt of demand notice for short levy of customs duty by Sri. Aboobacker.

7. Yet another contention is that the petitioner in W.P. (C) No. 31429/2011 had filed O.S. No. 1171/2005 before the Sub Court, Thrissur, inter alia seeking a declaration that she is the absolute owner of the property which was purchased in her name. The said suit was dismissed on a finding that the plaintiff was not in a position to prove that she is entitled for the declaration and injunction as prayed for. However, an appeal is pending before the District Court, Thrissur as A.S. No. 159/2009.

8. It is further contended that there is no illegality in the action taken by the Department as the restraint order is by exercise of powers under S. 142(1)(c)(ii) of the Customs Act, 1962 r/w. Rule 9 (i) of the Rules. It is also contended that since it is found by a Civil Court that the petitioner in W.P. (C) No. 31429/2011 could not establish that she is the actual owner of the property, it is open for the Department to proceed against the said properties which are in her individual name.

9. Heard learned counsel appearing for the petitioner Sri. C.K. Karunakaran and Sri. Rajasekharan Nair, standing counsel for the Customs Department Sri. Thomas Mathew Nellimoottil and the Government Pleader appearing on behalf of the revenue authorities.

10. The main argument of the learned counsel for the petitioners is with reference to the power of the Department to issue an order under S. 142(1)(c) of the Customs Act. The above provision reads as under:

142. Recovery of sums due to Government.-(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 28-B] is not paid,-

(a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or

(b) the Assistant Commissioner of Customs may recover or may require any other officer of customs to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the Assistant Commissioner of Customs or such other officer of customs; or

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

(i) the Assistant Commissioner of Customs may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector on receipt of such certificate shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue; or

(ii) the proper officer may, on an authorisation by a Commissioner of Customs and in accordance with the rules made in this behalf, distrain 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 28-B 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.]

11. The main contention urged by the learned counsel appearing for the petitioner is that the language used under S. 142 of the Customs Act, only gives power for the proper officer to distrain any immovable property belonging to or under the control of such person. The person, according to the learned counsel is only the defaulter, who is liable to pay any amount to the government which is clear from Section 142(1) which indicates that "where any sum payable by any person under this Act". Therefore such person mentioned in clause (c) is only the defaulter of government dues and for that reason the person mentioned in sub clause (ii) is again such defaulter.

12. It is further argued that the detention order has to be in respect of property "belonging to or under the control of such person".

13. It is therefore their contention that in so far as they are not defaulters and only legal heirs of the defaulter, their personal properties, which was purchased in their individual names cannot be detained by an order issued under S. 142(1) (c)(ii) of the Customs Act.

14. A proviso had been inserted to section 142(1) with effect from 10.9.2004. As per the proviso, if the defaulter does not pay any amount and transfers or otherwise disposes of his business or trade in whole or in part or affects any change in the ownership thereof, in consequence of which he succeeded in such business of trade by any other person all goods materials, preparations etc. in possession of such person so succeed shall also liable to be attached and sold for recovering the amount so payable from such predecessor.

15. This proviso also according to the learned counsel for the petitioners will not give an unfettered right to the department to proceed against a property purchased in the name of wife or sons, and even assuming for the sake of argument, that those were purchased from the income derived by the defaulter.

16. The Rules relevant in this regard are Rules 4, 9 and 28 which reads as under:

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 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.

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9. Private alienation to be void in certain cases.

(i) Where a notice has been served on a defaulter under Rule 4, the defaulter or his representative in interest shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him except with the written permission of the Proper Officer.

(ii) Where an attachment has been made under these rules, any private transfer or delivery of the property attached or of any debt, dividend or other moneys contrary to such attachment shall be void as against all claims enforceable under the attachment.

28. Procedure on death of defaulter.

If at any time after the Certificate has been issued by the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] the defaulter dies, the proceedings under these rules may be continued against the legal representatives of the defaulter, and the provision of these rules shall apply as if the legal representatives were the defaulter.

17. It is the contention of the learned counsel for the petitioners that attachment of property as specified under Rule 5 can only be made with reference to the defaulters property. Defaulter is defined in the Rules as any person from whom government dues are recoverable under the Act. It is their case that in so far as they are not defaulters the Rules cannot be invoked to prohibit their property from being alienated.

18. The learned counsel for the petitioner also relied upon the judgment of the Bombay High Court in Commissioner of Customs (Import) Vs. Gem Nuts and Produce Exports Co. Pvt. Ltd., for the proposition that the provisions of S. 142 can only mean that recovery can be effected in respect of property only if the property belongs to the defaulter or the property is under his control. In that case, earnest money deposit paid by defaulter was appropriated by the company holding the said deposit towards penalty for breach of contract. The said amount was considered as not belonging to the defaulter and cannot be attached. The judgment in Pepsico India Holdings Pvt. Ltd. Vs. Commr. of Cus. (Imports), Chennai, is also relied upon to contend that recovery proceedings against the successor in interest of the importer was contrary to the certificate issued by the Commissioner of Customs and therefore held as bad in law. It was held in the judgment that since the proviso to S. 142(1)(c)(ii) of the Customs Act was not in force as on the date of transfer i.e. 12.1.1994 and as there was no demand as on the said date the impugned proceedings were bad in law.

19. On the other hand, learned counsel for the Department strenuously contends on the basis of the statutory provision and the Rules that it is open for the Department to take action against the properties belonging to the petitioners since those properties were under the control of the defaulter, and as per the proviso to S. 142(1) it is open for the department to recover such amount. It is further argued that the writ petition filed by wife of the defaulter is not maintainable on account of the definite findings in the suit filed by her that the property does not actually belong to her and she could not get the declaration sought for.

20. The point for determination in this writ petition is whether the properties of the petitioners can be attached and sold by the department for recovery of the amounts due from Sri. Aboobacker. Strictly going by the provision under S. 142(1) of the Act r/w the Rules, it is not open for the department to attach and sell the property of any other person other than the defaulter, unless it is shown that some other person is holding the property of the defaulter. Since the petitioners have obtained the property under valid sale deeds it cannot be assumed for a moment that the property belongs to the defaulter. Then the question is whether the property is purchased in the name of the petitioners deliberately for avoiding payment of the creditors and they are holding the said property on behalf of the defaulter. Under S. 142(1)(c)(ii) it is possible for the department to recover any amount from any "immovable property belonging to or under the control of such person". The question is whether these properties were under the control of the defaulter at the time when Ext. P8 is issued and or at any time during his lifetime.

21. The argument of the department is that the wife of the defaulter was not having any income of her own and the children were students or minors during the time when the assignment deeds were executed in their favour. Except in respect of Ext. P2 property it could be stated that the properties were purchased by the petitioners and the sale consideration was paid by the defaulter. Ext. P2 was transferred by Aboobacker in favour of his son. Then the further question is whether if the sale consideration for the properties are paid by the defaulter can it be treated that he was having control of the said property. It is a settled proposition of law that proprietary rights can be held by the person having ownership in his own right, and it is possible even to purchase a property in the name of a minor. If the defaulter had intentionally with an intent to defraud the creditors arranged the purchase of the properties in the name of his wife and children, the question will be different. But in the case on hand, the department can only exercise the power vested in it under S. 142(1)(c)(ii) of the Act. The said provision does not enable the department to treat the property purchased by the petitioners as a fraudulent or a sham document in order to defeat the creditors.

22. Learned counsel for the Department, however, argues that since the prohibition under the Benami Prohibition Act does not apply to the transfer of

property or purchase of property in the name of wife and children, they are only Benami persons or name-lenders of the defaulter and for that reason it is open for the department to take action against the petitioners property. I do not think so. As already indicated Department is contained to the provisions of the Act and unless it is established that the defaulter has the control of the property which was in the name of the petitioners, the same cannot be attached alleging that it was a benami transaction or a sham transaction and it was fraudulently made out to defeat the liability towards the department. Learned counsel also relied upon the judgment in *Pothen Joseph v. Eipe Annamma*, 1951 KLT 310 : 1951 ICO 140 to contend for the proposition that a creditor need not file a suit to avoid a transfer which is fraudulent under S. 53 of the Transfer of Property Act. This proposition will not help the petitioner since that was a case in which decree was sought to be enforced against certain properties by contending that the said properties were transferred in violation of S. 53 of the Transfer of Properties Act. A contention was urged that unless the sale deeds are set aside by a separate suit, no proceedings in attachment could be taken. In that case after referring to a Full Bench judgment of the Madras High Court in *Ramaswamy Chettiar v. Mallappa Chettiar*, (ILR 43 Mad 760 (F.B.)) it was held that to avoid a transfer which is voidable under S. 53 of the T.P. Act it is not necessary that a separate suit should be filed and that it is enough that a creditor or creditors at whose instance the transfer is voidable repudiate the transfer by a unequivocal declaration in that regard. Therefore it was held that the property could be attached in execution of the decree which itself amounts to repudiation. *Jaya Vs. State of Kerala*, is relied upon for the proposition that even if the transfer of properties is effected much before service of demand on defaulter if the transfer is affected to a close relative it would be a transfer with intent to defeat or delay the creditors unless the contrary is proved.

23. *Sri Marcel Martins Vs. M. Printer and Others*, : 2012 (2) Recent Apex Judgments (R.A.J.) 578 : (2012) 5 SCC 342 : 2012 ICO 437 is relied upon to contend that Benami Prohibition Act will not attract if a person holds a property in a fiduciary capacity for the benefit of another person. *Bargavi v. Janaki*, 1995 (1) R.R.R. 505 : 1994 (2) KLT 262 (F.B.) is relied upon to contend that the Benami (Prohibition) Act, 1988 does not apply to sham transactions.

24. What transpires as per the factual circumstances involved in the case is whether the Department can attach and sell the property in the name of another person treating the same as hit by S. 53 of the T.P. Act or treating the same as sham transaction. It is not disputed that except Ext. P2 property other properties were not transferred by the defaulter in the name of the petitioners, whereas the same had been purchased in the name of the petitioners and probably with the funds of the defaulter. Ext. P1 property was purchased in the year 1997. Even according to the department, the notification 21.12.2001 was not known to them when the goods were cleared after the clearance of customs duty. That these goods were imposed with an anti-dumping duty was known to them only after the import was permitted. Therefore it is not possible to attribute knowledge on

the part of the defaulter in regard to the liability when the property was purchased in the name of the petitioners.

25. In regard to Exts. P2 to P5 properties, on a reference to the Rules referred above, it could be seen that as per Rule 5, the officer can attach the defaulters property until the amount is paid. Rule does not indicate that the defaulter to have any other meaning other than the person from whom government dues are recoverable under the Act, which again relates to S. 142(1) of the Act. Rule 9 prohibits private alienation to be void after attachment of the property under Rule 5. Apparently, the attachment is made only as per Ext. P8 dated 6.12.2010 and not in respect of the defaulters property. The procedure for sale of immovable property is covered by Rules 17 to 25 and the miscellaneous provision is covered by Rule 28 which indicates the procedure on death of defaulter. It is not in dispute that these provisions enables the department to take action against the property of the defaulter, but there is no vested right to take over any of the properties which are "in the name of the legal heirs of the defaulter in their personal name". True that, in a suit filed by wife of the defaulter, the Court did not grant a decree for declaration that no action has to be taken by the department against her private property. But the challenge in the present writ petition is with reference to a prohibitory order issued after the filing of the suit. The effect of the prohibitory order has to be considered in the light of the legal implications arising thereof, as to whether the Department has the power to invoke S. 142(1)(c)(ii) read with the Rules when properties are admittedly in the name of the petitioners and it is not devolved upon them on account of the death of the defaulter. I do not think that the statute permits such a course. They can only attach the properties of the defaulter or such properties under his control. If there is a dispute raised by the legal heirs that the properties acquired by them were not the properties under the control of the defaulter and those were personal acquisitions unless the Department in appropriate proceedings known to law that is by way of civil suit, take proceedings to attach and sell the property, it may not be possible for them to invoke Rule 9 of the Rules.

In the result writ petitions are allowed. Ext. P8 in W.P. (C) No. 28292/2011 and Ext. P4 in W.P. (C) No. 31429/2011 are quashed reserving the right of the department to take appropriate proceedings in accordance with law.