

(2013) 08 KL CK 0076

In the High Court Of Kerala

Case No : W.A. No"s. 279 and 439 of 2013

DY. Commissioner of Cus. (Preventive)

APPELLANT

Vs

Ayesha A.V.

RESPONDENT

Date of Decision : 19-08-2013

Acts Referred:

Citation : (2014) 300 ELT 167

Hon'ble Judges : Manjula Chellur, C.J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : Thomas Mathew Nellimoottil, SSC, for the Appellant; Devan Ramachandran, K.M. Aneesh, K. Santhosh Kumar (Kaliyanam), S. Nikhil Sankar, Adarsh Kumar, Advocates, P.I. Davis, Senior Government Pleader and T. Rajasekharan Nair, for the Respondent

Judgement

K. Vinod Chandran, J.—Both the appeals are filed by the official respondents (Customs Preventive Division) against the common judgment passed in two writ petitions filed by the wife and children of a "defaulter" under the Customs Act, 1962 (hereinafter referred to as "the Act") and proceeded against under the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 (hereinafter referred to as "the Rules"); the Rules having been framed in exercise of the powers conferred u/s 156 read with Section 142 of the Act. The issue, in a short compass, is whether, for dues of the "defaulter"; the appellants, viz., wife and children of the defaulter, are entitled to be proceeded against and the properties standing in their name, applied to the satisfaction of such dues of the defaulter; on the premise that the same were in fact purchased by the defaulter and that the purchase in favour of the defaulter's dependants and in one instance the conveyance made to his son are to defeat the recovery of dues to the appellant-Department. The transactions with respect to the properties thus not disclosing the true nature of ownership; in any event being in the control of the "defaulter", the same are liable to be proceeded against for dues of the defaulter, is the contention of the appellant.

2. The brief facts leading to the recovery proceedings are that the defaulter was running a proprietary business, in the course of which he imported CF Lamps from China into India. The goods were cleared as per Bill of Entry dated 28-12-2001 by paying the customs duty and not the Anti-Dumping Duty. Admittedly the Government of India had imposed Anti-Dumping Duty by a notification dated 21-12-2001, seven days before the actual clearance, which again admittedly was not even in the notice of the officials of the Department, it is clearly admitted that by an inadvertence triggered by ignorance the goods were cleared without imposition of Anti-Dumping Duty and later show cause notice for levy of such Anti-Dumping Duty was issued on 13-2-2003, imposing a duty of Rs. 97,35,379/- u/s 28(2) of the Act. The levy is not in dispute, since we are told that the same has attained finality with the dismissal of a SLP filed by the defaulter.

3. The Department has not detailed the various proceedings before the different forums, being the adjudicating authorities or the Courts; with respect to the levy as such and whether there were any interim orders staying the recovery. The appellants for their part assert ignorance of any of the proceedings since the "defaulter" though alive, is living separated. From the records we discern that the show cause notice was issued on 13-2-2003 and after finalization of the proceedings before the Supreme Court, a notice was issued on 6-12-2010 produced as Exhibits P4 and P8 [respectively in the writ petition of the wife, W.P. (C). No. 31429 of 2011, and the two sons, W.P. (C). No. 28292 of 2011].

4. The said notice, purporting to be under the Rules issued u/s 156 read with Section 142 of the Act, speaks of a notice u/s 142(1)(c)(ii) of the Act read with Rule 4 of the Rules issued to the defaulter. It also speaks of an enquiry conducted by the Department, which revealed that certain properties were in the possession of the wife and sons of the defaulter. It stated that the defaulter having been served with the notice under Rule 4, it shall not be competent to mortgage, charge, lease or otherwise deal with any property belonging to him under Rule 9 of the Rules. It also spoke of a suit filed by the wife of the defaulter for declaration and consequential injunction against the appellants, which suit stood dismissed. The notice then requested the Sub-Registrar, the addressee, not to allow mortgage, charge, lease or otherwise deal with any property belonging to the aforesaid persons. Hence obviously the levy was on the defaulter and so was the service of notice effected: but the restrain order was with respect to the properties standing in the name of the defaulter's wife and children.

5. The learned Single Judge essentially considered the question whether the Department can attach and sell the property standing in the name of another person treating the same as hit by Section 53 of the Transfer of Property Act, 1882 and treating the same as a sham transaction. It was noticed that except Exhibit P2 property, which was conveyed by the defaulter in the name of his son, the allegation with respect to all the other properties were that they were purchased in the name of the defaulter's dependants with the funds of the

defaulter. It was also found that certain properties were purchased in the name of the dependants even before the transaction, i.e., the import of the goods occurred. The learned Single Judge found that there is no vested right in the Department to take over any of the properties which are in the name of the dependants of the defaulter and it was categorically found that the statute does not permit such a course of action. Hence, the impugned notices were set aside and liberty was left to the Department to take appropriate proceedings known to law, if the Department intended to proceed against the properties and sell the same.

6. We have heard Sri Thomas Mathew Nellimoottil, learned Standing Counsel appearing for the appellants as also Sri Devan Ramachandran appearing for the wife of the defaulter and Sri C.K. Karunakaran appearing for the sons of the defaulter.

7. The learned Standing Counsel for the appellants would urge that the judgment of the learned Single Judge is contrary to the law declared by this Court and the Supreme Court with respect to the benami transactions and the fiduciary relationship existing between a husband and wife. Relying on the decision in Sri Marcel Martins Vs. M. Printer and Others, the learned Standing Counsel contends that the wife stood in a fiduciary capacity with the husband and the property purchased with the money of the husband, though standing in the name of the wife, the latter is bound to account for the same to the former. It can only be understood that the husband himself was managing the property and the same makes the property one which is in the control of the defaulter. The purchase in favour of the wife though protected under the proviso to Section 4 of the Benami Transactions (Prohibition) Act, 1988, (hereinafter referred to as "the Benami Act") the distinction drawn by the Supreme Court makes it very evident that this is in fact a sham transaction. The wife is only the ostensible owner and the real owner is in possession and control of the property and such real owner being the husband/defaulters, the Department is competent to proceed against the property. To establish that, the "defaulter" include the husband and wife, the learned counsel relies on a Division Bench decision of this Court reported in Sunitha K.K. Vs. A.S. Ramesh, With respect to the purchases alleged to be made in the name of the sons and the conveyance made in favour of the sons, the learned Standing Counsel would contend that the same are benami in nature.

8. The learned counsel for the respondents, being the wife and sons of the defaulter, strenuously urge that they were never a part of the business of the defaulter and that the contentions of the Department placed in support of the proceedings initiated against the properties of the wife and sons of the defaulter, are not supported by the statute under which they perform and are authorized to proceed for recovery. Sri Devan Ramachandran also would specifically point out that there were no proceedings taken by the Department against the wife and children of the defaulter; nor were they served with any notice, at the stage of initiation, by issue of show cause notice, for levy of Anti-Dumping Duty; nor in

the course of the adjudicatory proceedings, reaching up to the Supreme Court or even with respect to any recovery proceedings initiated against them. Even the notice dated 6-12-2010 (which are produced as Exhibits P4 and P8 in the respective writ petitions) was only to the Sub-Registrar and the respondents have not been informed of the distraint order by the Department. They are aggrieved insofar as the distraint order issued purportedly under the Act and the Rules effectively prohibit and inhibit them from dealing with any of the properties. This was the subject of challenge in the writ petition and the respective counsels urge us not to disturb the findings of the learned Single Judge.

9. We would first deal with the contention raised by the Standing Counsel with regard to benami transactions and sham transactions. The reliance placed on Ouseph Chacko and Another Vs. Raman Nair Raghavan Nair, in our opinion, is not at all relevant. A learned Single Judge, in the said case considered the difference between a Meenakshi Mills, Madurai Vs. The Commissioner of Income Tax, Madras, Thakur Bhim Singh (Dead) by Lrs and Another Vs. Thakur Kan Singh, were noticed to find that there are two kinds of benami transactions and in both, the real title is divorced from the ostensible title. In the first case there is a real transaction by an operative transfer by which the transferor divests himself of his title but does not intend to vest the title on the transferee named in the document; but does so in favour of a third person who provides the consideration and takes possession. The transferee therein is a mere name lender and is a "benami". In the second class there is no effective transfer, the transferor retains title and possession, and there is absolute lack of consideration. This would fall in the category of "sham transaction", though loosely termed as "benami". The learned Standing Counsel would also urge that the said view has been upheld by a Full Bench of this Court in Bhargavy P. Sumathykutty Vs. Janaki Sathyabhama and Others, The Full Bench in fact succinctly interpreted the "provisions of the Benami Act to hold that the intention of the legislature was only to prohibit and prevent transactions falling within the first category; which the Full Bench termed "tripartite transaction", while the sham transaction, termed as "bipartite transaction", were clearly out of the umbrella of the Benami Act. It was also opined that such parliamentary intention would be for the reason that a sham transaction would ever remain sham; though the case laws prior to the enactment of Benami Act loosely or inaccurately called such transactions also as a "benami" transaction.

10. In the instant case the Department claims that the property purchased in the name of the wife is that of the "defaulter" and since sub-section (2) of Section 3 of the Benami Act saves purchases of property by a person in the name of his wife, hence the property is to be treated as one in the control of the husband: here "the defaulter". The fact that the Benami Act saves a purchase in favour of the wife by the husband, from the prohibition contained in the statute, does not at all aid the Department unless it is established that the transaction was not for the benefit of the wife. There cannot be any control conferred on the husband

merely for reason of the purchase being made in the name of the wife; with the money of the husband. The further contention of the learned Standing Counsel is that the relationship between a husband and wife is fiduciary in character and that the husband having paid the consideration for the purchase of the property, the wife is bound to account to the husband and in such circumstance the property even if in the name of the wife, can be proceeded against for the dues of the husband/defaulters. The learned counsel also relies on the Division Bench decision of this Court in *Sunitha K.K. Vs. A.S. Ramesh*, and the decision of the Supreme Court in *Marcel Martins* (supra) to advance the said proposition.

11. *Sunitha* (supra) was a case in which an estranged wife claimed the cash and value of the ornaments and articles entrusted with the husband at the time of marriage. On execution proceedings initiated by the wife, the husband took a plea of no means. Looking at Section 51 of the Code of Civil Procedure, a Division Bench of this Court found that a plea of "no means" would not help the husband insofar as clause (c) of proviso to Section 51 CPC enables the Court to execute the decree for payment of money by detention in prison if it is satisfied that "the decree is for a sum for which the judgment-debtor was bound in a fiduciary capacity to account". This Court observed that to attract proviso (c), the requirement is not only that there must be a fiduciary capacity or relationship between the decree holder and judgment debtor, but the judgment debtor also must be made liable, because he was bound in such fiduciary capacity "to account". On facts it was held that the article sought to be returned by the estranged wife were entrusted to the husband by the wife in a fiduciary capacity and the husband is always liable to account for such properties so entrusted, whenever the wife makes a demand. The instant case is not a circumstance in which the husband calls upon the wife to account for his property. He is nowhere in the picture and the Department rested content with issuing a notice under Rule 4 of the Rules, that too only to the defaulter/husband. That cannot enable the Department to step into the shoes of the husband and invoke the fiduciary relationship he has with his wife and then claim recovery of dues to the Government from the properties which stand in her name; though purchased by her husband/defaulters.

12. *Marcel Martins* (supra) also, according to us, does not at all advance the case of the Department. The facts of the said case would indicate that the father and daughters were the plaintiffs in an action against the sole son, in whose name a property was settled by the Corporation. The deceased mother was holding lease over the subject property and the Corporation having taken a decision to sell such property to lease holders for consideration, the legal heirs of the original lease holder, being the husband and the children, together collected the amounts to be paid as consideration and paid it to the Corporation. However, since it was stipulated that the transfer of tenancy can be made only to one individual, the sale was made in the name of the son, who claimed exclusive rights to the property. The father and the daughters claimed co-ownership and filed a suit against the son and established that the money was transferred from the joint

kitty. The contrary stance of the son having paid the entire consideration by himself was clearly falsified from the evidence on record. The facts having been found against the son, it was contended before the Supreme Court that if the contention of the father and daughters that they had also advanced amounts to secure transfer of tenancy rights in the name of the son was accepted; then the claim would fail and the plaintiffs would be non-suited for the sole reason of the transaction being hit by the Benami Act and the prohibition thereon. The Hon^{ble} Supreme Court dealt with the meaning of the term "fiduciary" in extenso and as garnered from various authoritative texts, being "Corpus Juris Secundum", "Words and Phrases" Permanent Edn. (Vol. 16-A), "Blacks Law Dictionary", "Stroud's Judicial Dictionary" and "Bouvier's Law Dictionary"; found that the term connotes the idea of trust or confidence and applies to any person who occupies a position of peculiar confidence towards another. The term was held to refer to integrity and fidelity rather than a legal obligation as the basis of the transaction. Finding that on the facts established in evidence, it cannot be gainsaid that the transaction was a benami transaction hit by the provisions contained in Benami Act; the son was held to be holding such property in trust for his father and his siblings.

13. The principle stated in the said decision cannot clothe the Department with any power or authority or a legal right to step into the shoes of the husband/defaulters; as has been stated above. The transaction between the husband and wife cannot, going by the declaration of law in the decisions cited above, be ever termed as a benami transaction, since the Benami Act itself saves such transaction entered into for the benefit of the wife, even if the consideration is paid by the husband. To prove otherwise is the burden of the Department and we cannot but notice that the purchase in favour of the wife was long before the transaction upon which the additional duty was levied by the Department. With respect to the property standing in the name of the sons, again, it is the burden of the Department to establish before the appropriate forum that the same has been purchased in the name of the sons with the money of the father/defaulters. In one instance the Department's claim is again that the conveyance made by the defaulter in favour of his son is a sham transaction, which again has to be established before the appropriate forum conferred with the adjudicatory powers. We quote from the decision in Ouseph Chacko (supra):

A right under the general law for a declaration from a court of law that a transaction is fictitious, sham or nominal and that it has not been acted upon and was never intended to be acted, is not taken away by the Benami Transactions (Prohibition) Act. That right survives.

This in essence, according to us, is the liberty reserved by the learned Single Judge on the Department. That right has to be established before a Court of law unless the enactment confers any such judicial or quasi-judicial power to resolve such hurdles, on any officer again specified under the enactment.

14. Now we come to the issue of whether the notices and the proceedings taken

under the Act and the Rules can be sustained on the strength of the provisions of the Act and the Rules. The appellant/Department, at least in the case of the property of the wife, seems to heavily rely on the judgment of the Principal Sub-Court, Thrissur in O.S. No. 1171 of 2005, rejecting the claim for declaration and consequential injunction made by the wife. True, the declaration sought for, that the properties were purchased by the wife independent of her husband's income, was not granted. However, we do not understand how that alone can confer a right on the Department to proceed against the properties. Independent of the rejection of any general right sought to be asserted by the person against whom proceedings are taken, the Department should establish that such person is a "defaulter" under the Act and is liable to be proceeded with. If any person is holding property other than the defaulter and on which property the defaulter is said to have an interest, then there should be a provision in the statute clothing the officer entrusted with the levy or collection, to so adjudicate on the interest of the defaulter and come to a finding with respect to that. Of course then notice should also be served on all affected parties. We have already found that the contention with respect to the fiduciary relationship, benami transactions and sham transactions do not at all aid the Department unless they approach the proper forum for adjudication of such grounds, especially so when no officer authorized under the Act and the Rules are conferred with such adjudicatory powers. In the absence of any such judicial or quasi-judicial powers conferred on the authorities, the same can only be exercised by the Courts on which the State has conferred its judicial powers.

15. The provisions relevant for consideration is Section 142 of the Act and Chapter II of the Rules relating to procedure for attachment of property. Section 142 of the Act deals with recovery of sums due to Government and provides for the procedure for the same, when any sum payable by a person under the Act is not paid. Section 142(1)(a) deals with the authority of the officer to deduct or require any other officer to deduct the amounts due from any money owing to such person, which may be under the control of such officers. Section 142(1)(b) clothes the Assistant Commissioner or Deputy Commissioner of Customs to require another officer of the Customs to so recover any amounts payable by detaining and selling any goods belonging to such person which are under the control of any such officers. Clause (c) of sub-section (1) of Section 142 speaks of recovery in the event of failure of proceedings under clause (a) or (b) and it 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 under Sec. 28B is not paid, - xxx xxx xxx

(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 or Deputy Commissioner of Customs may prepare a certificate signed by him specifying the amount due from such

person and sent 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 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.

We are specifically concerned with sub-clause (ii) of Clause (c) under which the impugned notices dated 6-12-2010 have been issued.

16. For procedure relating to such recovery, the Rules have been framed by the Central Government. Before going to Chapter II, we notice the definition of "defaulter" in the Rules, which is as under:

R.2 (vi) "Defaulter" means any person from whom Government dues are recoverable under the Act.

Chapter II deals with the procedure for attachment of property and where any Government dues are not paid by any defaulter. Rule 3 confers power on the Assistant Commissioner or Deputy Commissioner of Customs to prepare a Certificate specifying the amount due from such person and to 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 deals with issue of notice, to be issued by the Commissioner on receipt of the Certificate mentioned in Rule 3, upon the defaulter, requiring him to pay the amounts specified in the Certificate within seven days. Rule 4 also speaks of an intimation to the defaulter and that on default of payment, such officer authorized shall take steps to realise the

amounts mentioned in terms of the Rules. Rule 5 deals with the attachment of property in the event of default of Rule 4 notice. Rules 6, 7 and 8 are not necessary for our purpose, since it deals with the attachment not being permitted to be excessive, the time of attachment and the inventory to be made. Admittedly no such proceedings were taken against any of the properties mentioned in the impugned notice of 6-12-2010. Nor is it possible since the properties obviously are not in the name of the defaulter.

17. Now we come to Rule 9, which reads as under:

Rule 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 claims enforceable under the attachment.

The contention of the appellants is that Rule 4 notice has been issued on the defaulter and under Rule 9, the properties mentioned in the notice under that rule are not entitled to be dealt with. Primarily we have to notice that the issue of Certificate under Chapter II is for the dues not paid by the defaulter to the Government and the amounts specified as the amounts due from "such person", and that "such person" can only be the "defaulter" and no other; going by the Act and the Rules. The Rules by its definition of "defaulter" also does not go beyond the person from whom the Government dues are recoverable under the Act. Even according to the notice dated 6-12-2010, notice under Rule 4 was served on the defaulter alone, i.e., the husband and father of the writ petitioners. Invoking Rule 9, the wife and children of the defaulter were interdicted from dealing with the properties owned by them, viz., the wife and the sons, and not the "defaulter". We also notice that the rules though provide for an attachment of the properties, no such attachment has been made and what is purportedly made by the notice dated 6-12-2010 is to distrain transactions of the property by the Sub-Registrar.

18. As we have noticed, while the distrain order dated 6-12-2010 speaks of a notice under Rule 4 to the defaulter, it lists out the properties belonging to the wife and children of the defaulter and distrain such property and interdict such other persons from dealing with their property. We are afraid, neither the Act nor the Rules provide for any such proceeding to be taken against the wife or the sons and recovery to be made from the properties owned and possessed by such other persons.

19. We have come across a decision of the High Court of Judicature at Bombay in Suman N. Agarwal Vs. Union of India and another, . A Division Bench, in the said

judgment, was considering almost a similar situation, wherein the petitioner had been proceeded against for recovery of the dues on the basis of a Certificate u/s 142(1)(c)(ii) of the Act read with Rule 6 of the Rules for debts of a Company (defaulter) in which the petitioner and her husband were Directors. The proceedings were specifically made against a property, more specifically a residential flat, which, according to the Department, was having number "1501" and was owned by the husband of the petitioner. The petitioner specifically contended that the said apartment No. 1501 was comprised of three separate flats having Nos. "A", "B" and "C, registered separately in the names of three persons, being herself, her husband and a third party. Looking at Section 142 and the Rules, it was found that the provisions of Section 142 and Chapter II of the Rules provide a cohesive scheme for attachment and sale of the property resulting in recovery of the dues; but categorically held that the process contemplated by Section 142(1) and Chapter II of the Rules is to be pursued against the defaulter, viz., the person from whom dues are recoverable by the Department. The contention on behalf of the Department that the apartment was a composite flat and that the division of it into three, was a purposeful act to circumvent recovery proceedings and the fact that the petitioner had not declared the said flat under the Income Tax Act were all held to be facts which are not matters for determination in the proceedings under the Act and the Rules. It was also clarified by the Bench decision that what they have said in the order would not amount to a determination on such aspects as that does not fall within the purview of the provisions of the Act and the Rules. This specifically is the liberty preserved by the learned single judge in the impugned judgment.

20. The learned Judges of the Division Bench in the earlier cited judgment referred to two earlier Division Bench judgments of that Court, reported in Mr. Sunil Parmeshwar Mittal Vs. Deputy Commissioner (Recovery) Cell, Central Excise, The Commissioner of Central Excise, Division-IV, Union of India (UOI) and The Registrar of Companies Ministry of Law and Company Affairs, and Vandana Bidyut Chaterjee Vs. The Union of India and Others, Both the said decisions were under The Central Excise Act, 1944 and the proceedings for recovery initiated under the Rules which has come up for consideration in the instant case. Sunil Parmeshwar Mittal (supra) was with respect to recovery against the former Directors of a company. The Court was concerned with whether from the backdrop of facts such former Directors could be made liable to pay the dues of the company. Going by the provisions of the Act, it was held that, while duty is charged on goods under the Act, the person who is liable to pay the duty is the person known as "the assessee". The duty being recoverable only from the person who is an assessee within the meaning of the definition and the assessee in the said case being a Company, it was held that the Act does not impose any obligation or liability on the former Director. Looking at the subordinate legislation, i.e., the Rules of 1995, and specifically the definition of "defaulter", it was held that the definition itself means any person from whom the Government dues are recoverable under the Act.

21. Vandana Bidyut Chatterjee (supra) was a case in which the daughter of the Director of a Company was proceeded against. The notice of demand was addressed to the father, being a notice to "defaulter" u/s 142(1)(c)(ii) of the Act. The father had, by a deed of gift, conveyed a property to the daughter which was in her possession and, hence, the daughter's property was proceeded against for recovery of the dues on the premise that in the Municipal records the property still stood in the name of the father. The petitioner in the said case, being the daughter, again, raised the issue of, herself or even her father being not liable to pay the dues of the Company, in her reply. The father of the petitioner having died during the proceedings, a notice of attachment was addressed to the petitioner as daughter of the Director of the Company. Again it was held that the duty and penalty were the arrears of the Company and it was the Company which was the person engaged in manufacture of the goods and registered as manufacturer u/s 6 of the Central Excise Act, 1944. It was held so:

Therefore the recovery proceedings under the Recovery Rules, 1995 can be taken only against the company, as it alone is the defaulter. There is no provision to recover the arrears of the company from its Directors and or/shareholders under the said Act. The arrears of dues belonging to a limited company are recoverable only from the limited company concerned which is an independent entity in law, particularly so, as it obtains a separate registration under the Act. Therefore in terms of the Recovery Rules, 1995, the dues can be recovered only from the limited company. There is no provision in the said Act as is found u/s 179 of the income tax Act, 1961 or u/s 18 of the Central Sales Tax Act, 1956 where the dues of a private limited company can be recovered from its Directors when the private limited company is under liquidation, in specific circumstances. It is a well settled position in law that a Company incorporated under the Companies Act, 1956 is a separate person having a distinct independent identity, independent from its shareholders and Directors. Consequently, the dues of the company cannot be recovered from the Directors and/or individual shareholder of the company. Further, it is pertinent to note that it is not the case of the Respondents that they are seeking to lift the corporate veil of the said company to establish that the said company was a mere shell and being utilized to defraud the revenue of its legitimate dues. Further the case of lifting the corporate veil, if any, was to be made out at the time notices of demand were issued to the said company by making the Directors/shareholders liable to pay the dues and the same being confirmed by the authorities under the said Act. Once it is an admitted position between the parties that the arrears of duty and penalty are those of the said Company then the notices issued under the Recovery Rules, 1995 to its former Director the late Balram P. Mukherjee and his daughter the Petitioner herein to whom the said property has been gifted, are completely without jurisdiction.

22. In the instant case also, the "defaulter" was the person who was conducting the business and the notice of default under the Rules was also served only on him. While invoking Rule 9, which prohibits alienation of properties in any

manner, the properties of the wife and children were sought to be distrained. As has been held by us as also in the above cited decisions, there is no power conferred on the officer to adjudicate on the ownership of a property held by another, deeming it to be ostensible ownership and find the defaulter to be the real owner. In all the aforecited decisions of the High Court of Bombay, it is to be noticed that the Directors of a Company were sought to be proceeded against. The distinct legal status of a Company, apart from its Directors and shareholders were rightly noticed and the Directors were absolved from being proceeded with for recovery of dues from the Company to the Government and this was on a specific finding that the Statute and the Rules framed thereunder provided only for recovery from the "defaulter" and for proceedings against the property of the "defaulter".

23. The learned Standing Counsel for the Department had relied on the decision in *Jaya Vs. State of Kerala*, to urge that even if transfer of property is effected much before the service of demand on the defaulter, still if the transfer is to a close relative, that would be deemed as a transfer with intent to defeat or delay the creditors, unless the contrary is proved. That decision was rendered in the teeth of Section 26A of the Kerala General Sales Tax Act, 1963, introduced to get over the attempt of the assesseees to create any manner of charge on a property so as to defeat a claim in respect of any tax or any other sum payable under the Act. The Revenue Recovery Act too provided such a provision u/s 44. As was noticed in *Vandana Bidyut Chatterjee (supra)*, we are afraid, such a provision is/was not available in the Customs Act or the Rules.

24. We notice that Section 142A making liabilities under the Act to be first charge was also brought in, only in the year 2011. In the absence of a provision, the like of which is found in the Kerala Sales Tax Act, the Central Sales Tax Act, the income tax Act and the Kerala Revenue Recovery Act, we are afraid, the Department cannot avail of any general principle to find a property possessed and owned by a person as being actually owned or under the control of a "defaulter" under the Act and then to proceed for recovery of such properties. Even if there were such a provision that would definitely require a process of adjudication; before, a property standing in the name of one is to be found actually or in control of another. Obviously, such a procedure would require notice too. Any such provision or procedure is totally absent from the provisions of the Act and the Rules and admittedly no notice has been sent to the petitioners in the two writ petitions. We also notice that the provision under Rule 9 making any transfer or delivery of a property attached as void would in any event be only effective from the date of notice under Rule 4, that too applicable only to the "defaulter"s" properties. The transactions said to have been made by the defaulter in the name of the wife and children are all before such notice was served on the "defaulter". The transaction with respect to the property which was the subject matter of the suit, we notice, was long before even the transaction which led to the short-levy. On the strength of the reasoning above, we respectfully agree with the findings rendered by three separate Benches of the

High Court of Bombay and hold that the judgment of the learned Single Judge is not liable to be interfered with, at all. The Writ Appeals are dismissed, however with no costs.