(2014) 03 BOM CK 0214

In the Bombay High Court

Case No : Writ Petition Nos. 11700 and 11702 of 2013

Keyur Shah APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 04-03-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 110, 127B, 127C, 142, 28

Citation : (2014) 306 ELT 603

Hon'ble Judges : S.C. Dharmadhikari, J;G.S. Kulkarni, J

Bench : Division Bench

Advocate : Prakash Shah and Jas Sanghvi i/by PDS Legal, Advocate for the Appellant; Pradeep S. Jetty, Advocate for the Respondent

Judgement

1. By these Writ Petitions under Article 226 of the Constitution of India, two individuals claiming to be Directors of two companies one of which is a private limited company whereas other is a public limited company, challenge the communications whereunder the Deputy Director, Directorate of Revenue Intelligence, Mumbai Zonal Unit writes to the Secretary of Cooperative Housing Society in which the Petitioners have residential flats and to the Secretary of Soni Chambers wherein the Petitioners as Directors of two Companies are having their office, informing that for protecting interest of the Revenue, three immovable properties mentioned in the said communications should not be sold, transferred or leased out in any manner without written No Objection Certificate from the Directorate of Revenue Intelligence. It is submitted that even if certain proceedings are contemplated for evasion of customs duty or short payment thereof, the same can be initiated against the Companies. There are two limited companies and as Directors of the said two limited companies, the Petitioners cannot be proceeded for recovery of customs duty. At the best there is limited power to proceed against the Directors of the Company. In the present case, if allegations in the show cause notice addressed to the parties are true, then, insofar as the present Petitioners are concerned, they are proceeded against for

recovery of penalty. The penalty amount is yet to be adjudicated and quantified. In these circumstances the communications of the present nature amounting to freezing of immovable properties, are not traceable to any of the provisions of Customs Act, 1962, or Rules made thereunder. The communications are, thus, without jurisdiction, null and void and consequently, the Writ Petitions under Article 226 of the Constitution of India are maintainable and the Petitioners need not take recourse to any other remedy.

2. On the other hand, Mr. Jetly, learned counsel appearing for the Respondents, submitted that there are at least two provisions in the Customs Act, 1962, namely, Section 28BA and another Section 110, whereunder the communications of the present nature could have been addressed and issued. In doing so, what the Department proposes to do is to provisionally attach the immovable property to protect the revenue. In the present case, non-payment of duty is enormous. In every such matters, in the garb of avoiding payment and by urging that it is only Companies which can be proceeded against and not the Directors, the parties like the Petitioners make it virtually impossible for the Department to recover the amount and even after adjudication. Therefore, pending adjudication the communications can be issued and to protect a larger public interest. Therefore, this Court should not quash and set aside the impugned communications.

3. We have been taken through several provisions of the Customs Act, 1962 and several decisions which are stated, according to Mr. Shah, to be covering the point in its totality.

4. However, Mr. Jetly has placed reliance on Section 28BA of the Customs Act, 1962 in order to support issuance of these communications. That provision reads thus:-

"Section 28BA. Provisional attachment to protect revenue in certain cases. - (1) Where, during the pendency of any proceeding u/s 28 [or section 28AAA or section 28B], the proper officer is of the opinion that for the purpose of protecting the interests of revenue, it is necessary so to do, he may, with the previous approval of the Commissioner of Customs, by order in writing, attach provisionally any property belonging to the person on whom notice is served under Sub-Section (I) of Section 28 [or sub-section (3) of Section 28AAA or sub-section (2) of Section 28B], as the case may be, in accordance with the rules made in this behalf u/s 142.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under subsection (1):

Provided that the Chief Commissioner of Customs may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he thinks fit, so, however, that the total period of extension shall not in any case exceed two years:

Provided further that where an application for settlement of case u/s 127B is made to the Settlement Commission, the period commencing from the date on which such application is made and ending with the date on which an order under sub-section (1) of Section 127C is made shall be excluded from the period specified in the preceding proviso."

5. A bare perusal thereof would indicate that if any proceeding is pending u/s 28 or Section 28AAA or Section 28B, the proper officer must record the opinion that for the purpose of protecting the interest of revenue it is necessary so to do, with previous approval of the Commissioner of Customs that he makes an order in writing for provisionally attaching any property belonging to the person on whom a notice is served under sub-section (1) of Section 28 or sub-section (3) of Section 28AAAor sub-section (2) of Section 28B, as the case may be, in accordance with the rules made in this behalf u/s 142. The provisional attachment shall cease to have effect after the expiry of six months period from the order under sub-section (1). The expectation is that within this period the proceedings be concluded and the liability or duty amount is crystallized.

6. If such is the ambit and scope of the provisions and which enable the Authority to provisionally attach the properties in order to protect the interest of revenue, then, it was incumbent upon the Authority to have satisfied himself and record an opinion in the manner provided by Section 28BA. The communication dated 12-3-2013 at page 25 to Writ Petition No. 11700/2013 reads as under:-

"To,

The Secretary, Oceanic Apartments Cooperative Housing Society Limited, Rajab Ali Patel Road, Off. Bhulabhai Desai Road, Mumbai-400026.

Sir,

Sub: Withholding change of ownership/transfer of properties-reg.

This office is conducting an investigation under the provisions of the Customs Act, 1962 against two firms by names M/s. arvel Gem & Jewellery (P) Limited, 31, Oceanic Apartments, Dr. Rajabali Patel Road, Off. Bhulabhai Desai Road, Mumbai and M/s. Mahapuja Products Limited, 202, Soni Chambers, 10, Avantikabai Gokhale Road, Opera House, Mumbai-400004 for evasions of applicable customs duty. During the course of investigation, it has come on record that two person viz. Shri Keyur Shah and Smt. Dimpy Shah who are the directors of said firms own following immovable properties in your housing society.

(i) Flat No. 23, Oceanic Apartments Cooperative Housing Society Limited, Rajab Ali Patel Road, Off Bhulabhai Desai Road, Mumbai-400026.

(ii) Flat No. 31, Oceanic Apartments Cooperative Housing Society Limited, Rajab Ali Patel Road, Off Bhulabhai Desai Road, Mumbai-400026.

2. For protecting the interest of revenue, it is required that the said property

should not be allowed to be sold/transferred/leased out in any manner without written N.O.C. from this office.

Yours faithfully, Sd- (Rajiv Garg) Dy. Director"

7. Similar is the wording of the further communication. We are of the opinion that such communications hardly answer the requirement of Section 28BA of the Customs Act, 1962. The communications by no stretch of imagination can be termed as an order in writing and in terms of the Section in question.

8. Even if Section 110 of the Customs Act, 1962 has to be resorted, there is something which is required to be recorded. In the present case, merely addressing such communications and insisting on No Objection Certificate of the Department before the immovable properties are transferred, does not come within the ambit and scope of this provision.

9. On this short ground alone, we quash and set aside the impugned communications. We are of the opinion that in the event the Revenue has any powers and traceable to one relied upon or such other provisions in the Customs Act, 1962, it may resort to the same and by strictly abiding the same, may make any appropriate order as required under law. We do not express any opinion as to whether Section 28BA or Section 110 can be resorted to or any other provisions which enable the Respondents to pass the orders. The Writ Petitions are allowed on this short ground and by giving liberty to the Respondents to take recourse to such powers as provided by law.

10. At this stage, we record the statement of Mr. Shah made on instructions and strictly without prejudice to the rights and contentions of the Petitioners that for a period of two weeks from today, the Petitioners would not dispose of or transfer or alienate the properties mentioned in the impugned communications at Annexure C-1 and C-2 to Writ Petition No. 11700/2013. Both the Writ Petitions are, accordingly, allowed. No costs.