(2009) 09 BOM CK 0187

In the Bombay High Court

Case No : Notice of Motion No. 440 of 2009 with Writ Petition No. 2087 of 2006

Satish D. Sanghavi — APPELLANT

Vs

Union of India and Others — RESPONDENT

Date of Decision : 22-09-2009

Acts Referred:
Central Excises and Salt Act, 1944 — Section 11A, 9, 9AA

Citation : (2012) 171 CompCas 309

Hon'ble Judges : F.I. Rebello, J;D.G. Karnik, J

Bench : Division Bench

Advocate : Prasad Batavia instructed by Indian Law Alliance, for the Appellant; M.I. Sethna with J.B. Mishra for Respondent No. 1, Ms. S.M. Dandekar, Additional Government Pleader for the Respondent No. 2, for the Respondent

Judgement

1. Considering the motion and the controversy, with consent of parties, both the motion and petition are taken up for final hearing. In Writ Petition No. 2087 of 2006, the petitioner has approached this court against the demand notice made by the respondents in respect of personal assets of the petitioner who was a director of a company known as M/s. Twin City Organics P. Ltd., which is now before the BIFR, in respect of which an order has been passed by the BIFR in respect of duty owed by the said company. The respondents had issued an order of attachment. That order had been given effect to, by attaching the flat which is the subject-matter of the present petition.

2. When the matter came up before this court for consideration, an order came to be passed on September 28, 2006, when on behalf of the Revenue learned counsel drew the attention of the court to section 9AA of the Central Excise Act, 1944. Section 9AA sets out that: "Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed was in charge of, and was responsible to the company for the conduct of the business of the company, as well as the company, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished

accordingly". Section 9 pertains to offences and penalties.

3. There was a duty demand in respect of the company u/s 11A. As the said amount was not paid the order of attachment came to be issued. Sections 9 and 9AA are in respect of criminal liability whereas duty is in respect of civil liability. Penalty imposed for breach of civil liability partakes of a different character from a criminal offence u/s 9AA. This distinction has been noted and reiterated by the Supreme Court in the case of Union of India v. Dharamendra Textile Processors [2008] 306 ITR 277 (SC); [2008] 11 RC 556; [2008] 18 VST 180; [2008] 231 ELT 3.

4. The settled position in law is that liability for duty of the company cannot be fastened upon the director of a company unless there is a statutory provision to that effect. Such an issue came up for consideration before this court in the matter of 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, , wherein the court took a view that liability of members is limited to the extent of face value of shares subscribed by each member and the amount remaining unpaid on them for time being former director of the company cannot be held responsible for payment of liabilities of company in the absence of any specific provision. This was reiterated in the unreported judgment delivered on May 5, 2009, in the case of Chandrakant Bhalchandra Garware v. Union of India, in Writ Petition No. 4117 of 2009. We are of the opinion that duty demand of the company cannot be recovered from the director in the absence of statutory provisions in the Central Excise Act, 1944.

5. Learned counsel for the petitioner, however, submits that another company known as Dyes Distribution India Ltd., which is/was also before the BIFR and in respect of which the penalty at Rs. 10,00,000 has been imposed personally on the director, the petitioner herein.

6. Learned counsel for the petitioner points out that to their knowledge they have not received any such notice. On the facts and circumstances, the present writ petition is disposed of by the following order:

1. Demand notice being exhibit C and notice of attachment being exhibit D to the petition are quashed and set aside.

2. The petitioner, however, will furnish a bank guarantee within six weeks from today for the sum of Rs. 10,00,000. The said bank guarantee to continue for a period of six months from today. It will be open to the respondents to take steps in law for recovery of the penalty after notice to the petitioner.

3. We make it clear that the said bank guarantee will not be invoked without following due procedure and notice to the petitioner. Rule made absolute, with no order as to costs.

4. In view of the disposal of the writ petition, the notice of motion has become

infructuous and is disposed of accordingly.

A copy of the said order to be made available to the petitioner.

