
(2013) 01 BOM CK 0091

In the Bombay High Court

Case No : Writ Petition No. 2347 of 2011 with Writ Petition No. 2586 of 2011

Suman N. Agarwal

APPELLANT

Vs

Union of India and another

RESPONDENT

Date of Decision : 10-01-2013

Acts Referred:

Central Excises and Salt Act, 1944 — Section 18

Constitution of India, 1950 — Article 226

Customs Act, 1962 — Section 124, 142, 142(1), 142(1)(c), 142(1)(c)(ii)

Income Tax Act, 1961 — Section 179

Citation : (2013) 3 ALLMR 302 : (2013) 7 BomCR 332 : (2013) 197 ECR 88 :
(2013) 289 ELT 281 : (2013) 18 GSTR 389 : (2013) 38 STT 598

Hon'ble Judges : D.Y. Chandrachud, J;A.A. Sayed, J

Bench : Division Bench

Advocate : Mayur Khandeparkar with Jamshed Ansari, for the Appellant;
Jitendra B. Mishra, for the Respondent

Judgement

D.Y. Chandrachud, J.—Rule, by consent made returnable forthwith. Counsel appearing on behalf of the Respondents waives service on behalf of the Respondents. By consent, both the Petitions are taken up for hearing and final disposal. The Petitioner has sought to impugn in these proceedings under Article 226 the validity of (i) a notice to show cause dated 29 August 2005 issued by the Assistant Commissioner of Customs, Drawback Department; (ii) an order dated 20 September 2007 of the Commissioner of Customs (Export Promotion); and (iii) a notice of demand dated 1 November 2011 issued by the Assistant Commissioner of Customs, Special Recovery Cell. When the Petition came up for preliminary hearing on admission, an order was passed by this Court on 19 December 2011 recording the statement of the Petitioner that the challenge is being restricted only to the notice of demand dated 1 November 2011 (Exhibit C) and that the other reliefs in prayer (a) are not being pressed. The challenge before the Court is accordingly confined to the aforesaid limited extent.

2. A notice to show cause was issued on 29 August 2005 u/s 124 of the Customs

Act 1962 to several entities and persons viz. (i) Nisum Exports & Finance Private Limited; (ii) Nisum Global Limited; (iii) Mehul Exports; (iv) Nirmal Agarwal and (v) Mayur Vakharia. The gravamen of the notice was a fraudulent claim of duty drawback. No notice to show cause was issued to the Petitioner. The Petitioner is a director of Nisum Global Limited. Mehul Exports is stated to be the proprietary concern of the spouse of the Petitioner. An adjudication took place in pursuance of which an order was passed by the Commissioner of Customs (Export Promotion) confirming a demand in the amount of Rs. 94.75 lacs against Nisum Exports and Finance Private Limited, in the amount of Rs. 53.05 lacs against Nisum Global Limited and Rs. 3.40 Crores against Mehul Exports. The adjudicatory order also imposed a fine in lieu of confiscation and personal penalties on the notices. No order of adjudication was passed against the Petitioner since admittedly the notice to show cause was not issued against her.

3. On 1 November 2011 a notice of demand was issued to the Petitioner amongst others stating that under the order of 20 September 2007 which had been forwarded for recovery by the Assistant Commissioner of Customs, Drawback Recovery Cell to the Assistant Commissioner of the Special Recovery Cell, an amount of Rs. 6.69 Crores was due together with interest. A certificate had been forwarded by the Assistant Commissioner of Customs, Drawback Recovery Cell u/s 142(1)(c)(ii) of the Customs Act 1962 read with Rule 6 of the Customs (Attachment of Property of Defaulters for Recovery of Customs Dues) Rules 1995 specifying that the amount was to be recovered from the Petitioner. The Petitioner has sought to challenge the notice of demand as being without jurisdiction.

4. In the companion petition¹ the Petitioner has sought to challenge a similar demand notice dated 1 November 2011 addressed to her on the basis of the order of adjudication passed against Nisum Global Limited in the amount of Rs. 96.07 lacs. It has been stated that the Assistant Commissioner of Customs, Drawback Recovery Cell has forwarded the certificate to his counter part in the Special Recovery Cell u/s 142(1)(c)(ii) read with Rule 6. Following the notice of demand, a notice of attachment has been levied both upon the Petitioner and her spouse Nirmal Agarwal. The notice of attachment has been addressed to the Petitioner and her spouse as directors of Nisum Exports and Finance Private Limited and as also in the name of Mehul Exports and Nisum Global Limited. The attachment has been challenged by the Petitioner in the companion petition.

5. In support of the challenge to the demand notice, Counsel appearing on behalf of the Petitioner submits that u/s 142(1)(c)(ii) the mode of recovery of sums due to Government has been provided where any sum payable by a person under the Act is not paid. The submission is that the expression "such person" in clause (c) of sub-section (1) must refer to and mean the person by whom any sum is payable. Moreover it has been urged that the power to distrain property belonging to and under the control of such person must mean the person by whom the amount is payable. Reliance has also been placed on the provisions of

Rules 3, 4, and 5 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules 1995 and it has been submitted that in the present case the certificate which was issued under Rule 3 was in the name of Mehul Exports, which is a proprietary concern of the spouse of the Petitioner and in the name of Nisum Exports and Finance Private Limited and Nisum Global Limited of which the director is shown as the spouse of the Petitioner. Hence, it was urged that since no certificate has been issued in the name of the Petitioner under Rule 3 of the Rules, it is not the Petitioner who has been treated as a defaulter and hence, there was no occasion to issue a show cause notice under Rule 4 to the Petitioner requiring her to pay the amount specified in the certificate, nor for that matter could an attachment be levied on the property of the Petitioner. Learned counsel has relied upon the judgments of Division Benches of this Court 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 in *Vandana Bidyut Chaterjee v. Union of India Writ Petition 165 of 2012* decided on 13 February 2012.

6. While opposing the Petition affidavits in reply have been filed on behalf of the Revenue. In the affidavit of the Assistant Commissioner dated 4 January 2012 there is a reference to the order of adjudication dated 24 September 2007 by which dues were confirmed on (i) Nisum Exports and Finance Private Limited; (ii) Nisum Global Limited; and (iii) Mehul Exports inter alia under Rule 16 of the Drawback Rules 1995. Following this, it was stated that demand notices were issued to the notices on 24 January 2008 following which on 1 November 2011 final notices were issued to the aforesaid firms/companies and their directors u/s 142 of the Customs Act 1962. The Petitioner is stated to be one of the directors of the two companies whereas it is an admitted position that Mehul Exports is a proprietary concern of her spouse. The affidavit states that the property which was attached by the Revenue is a joint ownership property in the joint names of the Petitioner/her spouse and one Rahul G. Chokhani. The property, comprising of flat 1501 is stated to have been divided into three portions : 1501A, 1501B and 1501C, each of which have been registered individually and separately in the names of the aforesaid three persons. The Revenue has attached the two properties which are stated to be registered in the name of the Petitioner and her spouse. The Petitioner claims to be the owner of flat 1501B situated at Oberoi Sky Heights, Lokhandwala, Andheri (West), Mumbai 400 053. A further affidavit has been filed on 25 June 2012 by the Assistant Commissioner in which it is sought to be stated that flat No. 1501 is a single flat for all practical purposes though registered separately by assigning three different numbers viz. 1501A, 1501B and 1501C in the names of the said three persons. At the time of the registration of the society the name of the Petitioner's spouse was alleged to have been given to flat 1501 which is a composite flat. The co-operative society is stated to have addressed a communication stating that flat No. 1501 stands in the name of three persons according to the records of the society. It has been

alleged that the Petitioner, though she holds a pan card, has not filed an income tax return and it appears that flat 1501 was shown as divided into three separate portions in order to avoid the scrutiny of the Income Tax Department.

7. In order to controvert the allegations contained in affidavit in reply an additional affidavit has been filed by the Petitioner on 23 July 2012 in which it has been stated that the building in question comprises of a ground floor and 36 upper floors having three flats on each floor except for six floors where there are only two flats. The Petitioner has stated that flat No. 1501A is shown in the records of the society in the name of her husband admeasuring 971 sq. ft.; flat No. 1501B is in her name and admeasures 950 sq. ft. while 1501C in the name of Rahul Chokhani admeasures 950 sq. ft. The Petitioner has stated that she had purchased the flat by an agreement dated 8 March 2004 for the sum of Rs. 29.45 lacs. The Petitioner has stated that she had taken a housing loan of Rs. 25 lacs from LIC Housing Finance Limited and has annexed the letter of sanction to the affidavit. In her affidavit in rejoinder the Petitioner has annexed a copy of the registered agreement dated 8 March 2004 in her name under which flat No. 1501B was transferred and sold to her. The agreement refers to the area of the aforesaid flat as 950 sq. ft. and contains a floor plan. The Petitioner has also relied upon the bill of the co-operative society addressed to her in respect of flat 1501B. Further affidavits have been filed on behalf of the Revenue in which broadly the same defence is sought to be raised.

8. Section 142(1) inter alia stipulates that where any sum payable by any person under the Act is not paid, in such a case (a) the proper officer may deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or any other officer of Customs; (b) The Assistant or Deputy Commissioner may recover or require any other officer to recover the amount so payable by detaining and selling any goods belonging to such person. The expression "such person" in clauses (a) and (b) of sub-section (1) of Section 142 evidently means the person by whom any sum is payable under the Act. Clause (c) of sub-section (1) provides for the recovery of the amount due from "such person" in the event that it cannot be recovered under clauses (a) and (b). Under sub-clause (i) of clause (c) the Assistant or Deputy Commissioner has to prepare a certificate specifying the amount due from such person and to remit it to the Collector of the district where such person owns any property or resides or carries on business. Thereupon the Collector has to recover the amounts specified in the certificate as an arrear of land revenue. Under sub-clause (ii) of clause (c) the proper officer is empowered on an authorization by the Commissioner and in accordance with the rules to distrain any movable or immovable property belonging to such person and to cause it to be sold if the amount remains unpaid for a period of thirty days. The relevant part of Section 142(1)(c) provides as follows :

(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 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 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.

9. The Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules 1995 have inter alia been framed u/s 142 of the Customs Act 1962. The expression "certificate" in Rule 2(iii) is defined to mean the certificate required to be issued by the Assistant Commissioner or Deputy Commissioner u/s 142(1)(c). The expression "defaulter" is defined in Rule 2(vi) to mean "any person from whom government dues are recoverable under the Act". Rules 3, 4 and 5 are as follows :

3. Issue of Certificate. -Where any Government dues are not paid by any defaulter, 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 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.

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 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.

5. Attachment of property.-If the amount mentioned in the notice issued in terms of the preceding rule is not paid within seven days from the date of service of this notice, the Proper officer may proceed to realise the amount by attachment and sale of defaulter's property. For this purpose, the proper officer may detain the defaulter's property until the amount mentioned in the Certificate together with the cost of detention is paid by the defaulter.

10. Rule 3 requires the issuance of a certificate by the Assistant or Deputy Commissioner of Customs where government dues are not paid by the defaulter,

specifying the amount due from such person. Under Rule (4) on receipt of the certificate, the Commissioner can authorize an officer to serve a show cause notice upon the defaulter requiring him to pay the amount within seven days. Under Rule 5 if the amount specified in the notice is not paid within the period stipulated the proper officer is empowered to realise the amount by attachment and sale of the defaulter's property. The provisions of Section 142 and of the Rules of 1995 provide a harmonious scheme for the recovery of amounts due and payable from any person under the Act. The deduction of the amount due from any amount payable to such person under clause (a), the detention and sale of goods belonging to such person under clause (b), the issuance of a certificate under sub clause (i) of clause (c) and the distraining of movable and immovable property belonging to such person under sub-clause (ii) of clause (c) followed by the sale of property are all part of this cohesive scheme. What is significant is that the entire process that is contemplated by Section 142(1) and by the Attachment Rules of 1995 is to be pursued against the defaulter viz. the person from whom government dues are recoverable under the Act.

11. This view finds support in the judgments of the Division Benches of this Court in Sunil Parmeshwar Mittal (*supra*) and in Vandana Bidyut Chaterjee (*supra*).

12. Now in the present case the notice to show cause u/s 124 was not issued to the Petitioner. The order of adjudication dated 20 September 2007 was similarly not in respect of the Petitioner. The certificates that were issued u/s 142(1)(c)(ii) on 19 March 2010 were in the names of (i) Mehul Exports of which the proprietor is Nirmal Agarwal, the spouse of the Petitioner; (ii) Nisum Exports and Finance Private Limited of which the director is stated to be Nirmal Agarwal in the certificate; and (iii) Nisum Global Limited of which again the director is stated to be Nirmal Agarwal. The Petitioner at the highest, as the affidavit in reply states, is one of the directors of Nisum Global Limited and of Nisum Exports and Finance Private Limited. But that is not sufficient to follow the recoveries that are due and payable by the two companies in the hands of the Petitioner who is a director. As the Division Bench of this Court has noted in the judgment in Vandana Bidyut Chaterjee (*supra*), there is no provision in the Customs Act 1962 similar to Section 179 of the Income Tax Act 1961 or Section 18 of the Central Sales Tax Act 1956 where the dues of a private limited company can be recovered from its directors. A company which is a juristic entity has a status independent of its directors and shareholders. If in a given case, it is the contention of the Revenue that the entity of a corporate body is a mere shell which is being utilized to defraud the Revenue, a case for lifting the corporate veil has to be made out when notices of demand are issued to the company by making the directors/ shareholders liable to pay the dues. In the present case, no such exercise was carried out and as we have noted neither was a notice to show cause u/s 124 issued to the Petitioner nor was an order of adjudication passed against her. The certificate that was issued u/s 142(1)(c)(ii) was not issued to the Petitioner. Hence, the action of addressing a demand to the Petitioner on 1 November 2011

u/s 142(1)(c)(ii) read with Rule 6 of the Attachment Rules and the consequential attachment are wholly without the authority of law.

13. The affidavits which have been filed on behalf of the Revenue proceed on the basis that flat 1501 is a composite flat which has been bifurcated into 1501A, 1501B and 1501C respectively. The Petitioner has annexed to a rejoinder dated 18 June 2012 a copy of the registered agreement dated 8 March 2004 under which the flat bearing No. 1501B was purchased by her. The Petitioner has also relied upon the bills of the co-operative society in respect of flat 1501B. In the additional affidavit dated 23 July 2012, the Petitioner has stated that she had obtained a loan of Rs. 25 lacs for the purchase of the flat from LIC Housing Finance Limited. Whether the Petitioner is in breach of any of the provisions of the Income Tax Act 1961 is not an issue which falls for determination in these proceedings and we clarify that nothing contained in this order would amount to a determination on that aspect which does not fall within the purview of these proceedings. In the circumstances, we have come to the conclusion that the action of the Revenue in seeking to issue a notice of demand dated 1 November 2011 upon the Petitioner and the levy of attachment to the extent of the interest of the Petitioner in flat 1501B are unlawful and would have to be set aside. We order accordingly. We, however, clarify that the order would be confined only to the Petitioner insofar as she is aggrieved by the notice of demand and to the extent of the interest of the Petitioner in respect of flat 1501B.

Rule is made absolute in the aforesaid terms in both the Petitions. There shall be no order as to costs.

1 Writ Petition 2586 of 2011.