(2014) 08 BOM CK 0197

In the Bombay High Court

Case No : Writ Petition No. 1860 of 2013

Surlux Diagnostic Ltd. APPELLANT

Vs

Assistant Commissioner of Customs RESPONDENT

Date of Decision : 25-08-2014

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 142

Citation : (2015) 316 ELT 78

Hon'ble Judges : S.C. Dharmadhikari, J;A.K. Menon, J

Bench : Division Bench

Advocate : M.M. Vashi, Senior Advocate, Prachi and S.M. Sharma i/by M.P. Vashi and Associates, Advocates for the Appellant; Pradeep S. Jetly and J.B. Mishra, Advocates for the Respondent

Judgement

1. By this Writ Petition the Petitioners are praying for a writ of mandamus or any writ, order or direction of that nature under Article 226 of the Constitution of India directing the Respondent No. 1 to withdraw the letter dated 29-5-2013 (Annexure-H to the Writ Petition). As far as the Petitioner No. 1 is concerned, it is a public limited company and having it''s registered office at the address mentioned in the cause title. The Petitioner Nos. 2 and 3 are the purchasers of a flat which belongs to the Petitioner No. 1. The Respondent No. 1 is the officer, namely, Assistant Commissioner of Customs exercising the powers under the Customs Act, 1962 whereas the Respondent No. 2 is a Cooperative Housing Society which is owner of the building. In the building there is a flat being Flat No. 58, 5th Floor, Chhadva Apartment, Sion Trombay Road, Chembur, Mumbai-400071 which is referred to as the said flat. The said flat was purchased under the Agreement for Sale dated 3-7-1986 by the Petitioner No. 1. The share certificate was issued by the Respondent No. 2 in the name of the said Petitioner. The communications at Annexures A, A1, B, C and D are relied upon to show as to how the Petitioner No. 1 acquired the said flat and has thereafter dealt with the Cooperative Housing Society inter alia in payment of maintenance charges.

The Petitioner No. 1 was directed to be wound up by an order passed by this Court. However, it has been revealed that one Mr. S.K. Sarpotdar made an application to this Court and an order was made on 8-10-2012 in Company Application No. 218/2012 in Company Petition No. 275/1995. A copy of the said order at Annexure-E to this Writ Petition is relied upon to show that the learned Single Judge of this Court presiding over as a Company Judge passed an order recalling the winding up. In such circumstances the Petitioner No. 1 sold the said flat to the Petitioner Nos. 2 and 3 under the Agreement for Sale dated 9-4-2013. These Petitioners made an application to the Cooperative Housing Society for transferring the share certificate in their name. The Society informed these Petitioners that there is a communication received from the Assistant Commissioner of Customs dated 29-5-2013 and on account of which the transfer cannot be effected.

2. The Petitioners thereafter made inquiries and they learnt that an order was passed on 30-5-2000 by the Commissioner of Customs against M/s. Surlux Mediquip Limited and it''s unit, namely, M/s. Surlux Medicare. In these circumstances the Petitioners took up the matter with the Respondent No. 1 and requested him to clarify that there is absolutely no order passed in the case of the Petitioner No. 1. Therefore, the communication dated 29-5-2013 should be withdrawn by him. However, there is no response to this request that is why the Petitioners have approached this Court.

3. The communication at the level of the Commissioner of Customs and stated to be of 29-5-2013 is referred to in the Society''s letter dated 7-6-2013 addressed to the Petitioner No. 2. That is at page 38 Annexure-G to the Writ Petition. Annexure-H is a copy of the letter dated 29-5-2013 addressed by the Respondent No. 1 to the Respondent No. 2, which reads as under:-

"Office of the Commissioner of Customs (Import) Tax Recovery Cell, Air Cargo Complex, Sahar, Andheri (East), Mumbai-400099. F. No. S/3-MISC-09/12-13/ TRC-ACC.

Dated 29-5-2013

To,

The Secretary/Chairman, Chhadva Premises Co-op Society Limited, Chhadva Apartments, Near Diamond Garden, Sion Trombay Road, Chembur, Mumbai-400071.

Sir/Madam,

Sub:- Recovery of pending Govt. dues from M/s. Surlux Medicare, owner of Flat No. 58, 5th Floor, Chhadva Premises Cooperative Society Limited, Chhadva Apartments, Near Diamond Garden, Sion Trombay Road, Chembur, Mumbai-400071 - reg.

You are hereby informed that M/s. Surlux Medicare, owner of Flat No. 58, 5th

Floor, Chhadva Premises Cooperative Society Limited, Chhadva Apartments, Near Diamond Garden, Sion Trombay Road, Chembur, Mumbai - 400071 have failed to pay penalty of Rs. 2,00,00,000/- (Rupees Two Crore only) and Redemption Fine of Rs. 2,81,00,000/- imposed on them vide order-in-original No. SHB/Gen/53/98/ ACC dated (copy enclosed). Hence, recovery action under Section 142 of Customs Act, 1962 has been initiated against them.

In view of above you are prohibited against allowing transfer of property rights or creation of third party interest in the property located at Flat No. 58, 5th Floor, Chhadva Premises Cooperative Society Limited, Chhadva Apartments, Near Diamond Garden, Sion Trombay Road, Chembur, Mumbai-400071 and any other properties owned by M/s. Surlux Medicare without obtaining No Objection Certificate from the undersigned.

Thanking you.

Yours sincerely, Sd/- (Dr. Kiran Kumar Kari, APU) Asstt. Commissioner of Customs, Tax Recovery Cell."

4. Mr. Vashi, learned senior counsel appearing for the Petitioners, submits that a reference to the order-in-original dated 31-5-2000, copy of which has also been annexed to the Writ Petition as Annexure-I page 42, reveals that the same is passed not against the Petitioner No. 1, but one M/s. Surlux Medicare. That order refers to the Company as M/s. Surlux Medicare and terms it as an Importer. The Petitioner No. 1 is M/s. Surlux Diagnostic Limited. The submission of Mr. Vashi is that there are two distinct corporate entities and having independent legal existence. There is nothing on record which would indicate that the Commissioner of Customs is empowered to either attach or direct that there is an encumbrance of the Customs Department insofar as the subject flat is concerned. Unless and until it is demonstrated that the Petitioner No. 1 has defaulted in payment of Customs Duty and therefore, the property/flat is required to be attached and sold during the course of recovery proceedings, the present communication cannot be sustained. That deals with a different legal entity. In such circumstances Mr. Vashi submits that the Writ Petition be made absolute.

5. On the other hand, Mr. Jetly, learned counsel appearing for the Respondents, would submit that a closer look at the facts would be necessary. There is a Group of Companies called Surlux Group of Companies. The affidavit in reply and paragraph 6 onwards would indicate as to how these are Group Entities/ Companies and under the common management. There is a clear attempt, therefore, not to allow the Respondent No. 1 and particularly the Department of Customs to recover its dues. It has been stated that M/s. Surlux Medicare (it is a unit of M/s. Surlux Mediquip Limited) and which in turn part of Surlux Group of Companies. Mr. Jetly has tried to demonstrate as to how there is interconnection and that Group of Companies have together defaulted in payment of the Government dues. In such circumstances the attempt of the Petitioners is to

somehow stall the recovery proceedings and this should not be permitted by this Court. For all these reasons it is submitted that the writ jurisdiction which is equitable and discretionary should not be exercised to assist the parties like the Petitioners. The Writ Petition, therefore, be dismissed.

6. Having heard both sides and perusing with their assistance the Writ Petition and all annexures thereto, so also, the affidavit in reply we are not in agreement with Mr. Jetly that the exercise which the Customs Department wants to undertake can be undertaken. The attempt of the Customs Department is to show that the Group of Companies is called as Surlux Group of Companies. M/s. Surlux Mediquip Limited was the parent company of M/s. Surlux Medicare. From paragraph 33 of the affidavit in reply an attempt is made to show that a Group of Companies can be termed as sister companies/concerns. Their management is common and also their addresses in some cases. However, insofar as the present entity, namely, Petitioner No. 1 is concerned, it is fairly stated that it has other addresses one of which is Flat No. 58 (said flat). However, what is tried to be urged is that the information that is received by the Customs Department indicates that they are Group of Companies and therefore, the assets can be termed as "Group Assets". It is in these circumstances that the communication dated 29-5-2013, which is impugned in this Writ Petition, is justified and supported by the Respondent No. 1.

7. However, a closer look at the record would indicate that this is an attempt made by the Respondent No. 1 to justify the issuance of the communication which is reproduced above. Even if now there is an attempt made to show that there is a Group of Companies and the import was for various Companies and which are sister concerns, what we find from the order-in-original is that therein a specific and distinct legal entity has been termed as Importer and that is not the Petitioner No. 1. In fact M/s. Surlux Medicare is stated to be the Importer. M/s. Surlux Mediquip Limited has been referred to in the order of adjudication/order-in-original. In such circumstances when the communication and all recovery measures are traceable to this order-in-original dated 31-5-2000, then, the contents thereof cannot be discarded or brushed aside by us. Throughout it has been stated that there is a consignment which has been received. The inquiries that were made by the Department demonstrate that there is import of medical equipments. The import of medical equipments is at the instance of one M/s. Surlux Medicare. The Importer has failed to adhere to the conditions subject to which the exemption from payment of Customs Duty was granted. Eleven consignments and which are subject matter of the order-in-original are stated to have been imported at the instance of M/s. Surlux Medicare. That entity is referred to as the Importer. There is a statement recorded of Mr. Sarpotdar, General Manager of Surlux Group of Companies and it is on that basis it has been stated in the affidavit in reply that even the Petitioner No. 1 owes its present existence to this Mr. Sarpotdar. It is this Mr. Sarpotdar who made the application for recalling the order of winding up and for revival of the Petitioner No. 1. From this alone and without anything more we would not be in a position

to hold that there is close connection or that the entire import was at the instance of the Group of Companies and that is how the Petitioner No. 1 was involved. The Respondent No. 1 will have to adopt appropriate proceedings in the event it desires to now support his conclusions and which are stated to be based on the record. For the present we cannot proceed to hold that the Petitioner No. 1 which is stated to be owner of the Flat No. 58 could be deprived of its right, title and interest therein and particularly to transfer the flat in favour of the Petitioner Nos. 2 and 3. The connection between the Petitioner Nos. 2 and 3 and with the alleged Group of Companies has not been established. It is in these circumstances that addressing the communication to the Respondent No. 2 was not justified. The communication which we have reproduced above informs the Society that M/s. Surlux Medicare is owner of the Flat No. 58 and that has failed to pay penalty of Rs. 2 crores and Redemption Fine of Rs. 2.81 crores imposed by the order-in-original. That is how the recovery action under Section 142 of the Customs Act, 1962, has been initiated. However, the Petitioners have relied upon the share certificate and which has been issued by the Respondent No. 2 Society. They have also relied upon the order passed by the learned Single Judge of this Court in Company Application No. 218/2012 in Company Petition No. 275/1995 dated 8-10-2012. The winding up order was passed against M/s. Surlux Diagnostic Limited (Petitioner No. 1) on 10-2-1999 in the above Company Petition. That has been recalled only on 8-10-2012. Prior thereto the Society has issued the share certificate, copy of which has been annexed at page 15 of the paper book as Annexure-Al. It is a true copy of the share certificate and which bears the endorsement at its reverse and particularly under the head "Memorandum of Transfers". There, on 6-11-1986 the flat No. 58 (said flat) has been transferred to the Petitioner No. 1. It is in these circumstances that we are unable to accept the contentions of Mr. Jetly at this stage.

8. As a result of the above discussion, the Writ Petition succeeds. The communication dated 29-5-2013 addressed by the Respondent No. 1 to the Respondent No. 2 is set aside.

9. However, without prejudice to the rights and contentions of both sides and since the Respondent No. 1 desires to initiate the appropriate proceedings in accordance with law including to proceed against the Petitioners if permissible, that we direct that for a period of Eight Weeks from today the Respondent No. 2 shall not register the transfer of flat No. 58 in favour of the Petitioner Nos. 2 and 3 or any other persons claiming through them and stated to be under the Agreement of Sale executed by and between the Petitioner No. 1 and Petitioner Nos. 2 & 3. All contentions in relation to the action that the Respondent No. 1 may propose to take and equally the Petitioners defence thereto are kept open. The Writ Petition is allowed in these terms. No costs.

