
(2016) 07 MAD CK 0070
In the Madras High Court
Case No : Writ Petition No. 32997 of 2015

V.A. Ramash

APPELLANT

Vs

Assistant Commissioner of Customs, Chennai

RESPONDENT

Date of Decision : 11-07-2016

Acts Referred:

Citation : (2016) 339 ELT 18

Hon'ble Judges : T.S. Sivagnanam, J.

Bench : Single Bench

Advocate : Shri S. Rahunathan, Advocate, for the Petitioner; Shri K. Mohana Murali, Senior Panel Advocate, for the Respondent

Final Decision : Allowed

Judgement

T.S. Sivagnanam, J.— Heard Mr. S. Rahunathan, learned counsel appearing for the petitioner and Mr. K. Mohana Murali, learned Senior Panel counsel appearing for the respondents.

2. The Petitioners have challenged a notice of attachment issued under Rules 9 and 10 of the Customs (Attachment of Property of Defaulters for Recovery of Government Dues), Rules, 1995, dated 5-10-2015. The first petitioner is the husband of the second petitioner and they are co-owners of the property which is subject matter of the impugned attachment. The impugned notice states that the first petitioner is liable to pay a sum of Rs. 5,44,291/- along with interest as applicable being the amount of Government dues payable as per the terms of the Order-in-Original No. 15014/2011, dated 7-3-2011, passed by the second respondent under Sections 28(1) and 28AB of the Customs Act, 1962.

3. The facts, which are necessary for disposal of the Writ Petition, are that the petitioners are Directors of M/s. Tapan Preci Tek Ltd., a company incorporated under the Companies Act, 1956. The said company was issued a EPCG licence by the Joint Director General of Foreign Trade for import of capital goods under the EPCG scheme vide Customs Notification No. 160/92. The company imported the

capital goods by availing the exemption on the condition to fulfil the export obligation within the time prescribed by the Licensing Authority. A bond was executed by the first petitioner in the capacity of Managing Director of the company undertaking to fulfil the export obligation as per the exemption notification. Consequent upon the failure to fulfil the export obligation, show cause notice dated 8-1-1998 was issued to which there was no response and ultimately, an order was passed by the adjudicating authority, dated 7-3-2011. The amount ordered to be paid under the said order, is now sought to be recovered as Government dues by attaching and bringing for sale, the properties owned by the petitioners.

4. The contention raised by the petitioner is that the bond was executed by the company, however, due to torrential rains in 2003, water entered the petitioners' factory premises, all the records documents were completely destroyed and the petitioners have no documents relating to the subject transaction. On account of financial crisis faced by the company, they had to sell the factory on outright sale during March, 2006 to clear the loans payable to various institutions. It is submitted that the impugned proceedings is in violation of principles of natural justice, as no notice of proceedings was issued to the petitioner prior to serving impugned notice of attachment. Further, it is submitted that the impugned notice of attachment attaching the personal properties of the petitioners is wholly without jurisdiction and the petitioners cannot be made personally liable for the alleged dues of the company. The respondent ignored the fact that the company is a separate legal entity and the liability of the company cannot be fastened on the petitioners.

5. The learned counsel for the petitioner after reiterating the above grounds referred to the definition of defaulter under the 1995 Rules as defined under Rule 2(6), which means any person from whom Government dues are recoverable under the Customs Act, 1962 and the petitioner is not a defaulter. Further, it is submitted that even against the defaulter the procedure for attachment as stipulated under Chapter 2 of the Rules have to be followed, which includes issuance of notice in terms of Rule 4, which has not been complied with. Further, it is submitted the bond which has been referred to by the Department, has been signed by the first petitioner in the capacity of Managing Director of the company and the respondents cannot proceed against the petitioners' personal capacity for the alleged dues payable by the company.

Further, an affidavit has been sworn to by the first respondent, dated 27-11-2015, stating that the company has not been wound up till date, though the factory and building were sold and the entire sale proceeds have been utilised to clear the outstanding dues of the company including the statutory dues and the dues to the employees. Further, it is stated that though the company has not been wound up till date, it does not own any property as on date. Reliance was placed on the decision of the Hon'ble Division Bench of the Bombay High Court in the case of Vandana Bidyut Chaterjee v. UOI & Ors.,

reported in (2012) 171 Comp Cas 311 (Bom.) = 2013 (292) E.L.T. 6 (Bom.), and the decision of the Hon"ble Division Bench of the Delhi High Court in the case of Anita Grover v. Commissioner of Central Excise & Ors., reported in 2013 (288) E.L.T. 63 (Del.).

6. The learned Senior standing counsel appearing for the respondent submitted that the petitioners-importers did not respond to the show cause notice and personal hearing and deliberately evaded the submission of export obligation discharge certificate and after affording effective opportunity and complying with the principles of natural justice, the order-in-original dated 7-30-2007 (sic), was passed. Further, it is submitted that as per the condition of duty exemption notification issued under any export incentive schemes including EPCG, the petitioner-importer's obligation to fulfil the notification's conditions is continuing one and there is no time limit to invoke the conditions of notification. To that effect, the petitioner-importer had executed the Bond binding themselves to pay the duty with interest on demand in case of failure to fulfil the conditions of the notification i.e., non-fulfilment of Export Obligation. Hence, the petitioner's arguments that the order of adjudication is without jurisdiction and barred by time limit are legally incorrect. It is further submitted that the respondents are acting within the purview of Section 140 of the Customs Act, which deals with "Offences by companies" and every Director is liable for the offence committed by the company and in the present case, the bond executed by the company for the EPCG licence, is binding on the petitioners. In support of his contention, the learned counsel appearing for the respondents referred to the decision in the case of Textoplast Industries v. Additional Commissioner of Customs reported in 2011 (272) E.L.T. 513 (Bom.).

7. Admittedly, the property which is subject matter of the impugned notice of attachment, is a personal property of the petitioners and is not an asset owned by the company. The petitioners are not the importers, but it is the company, which imported the capital goods by availing the benefit of an exemption notification under the EPCG scheme. The company bound itself to the department by executing a bond assuring compliance of the conditions contained in the licence. The importer was under obligation to fulfil the export obligation within the time permitted which admittedly has not been done. This resulted in an order being passed for recovery of the duty amount granted as exemption. The said order remains unchallenged till date. The petitioners' case is that due to floods in 2003, all the records were fully damaged and they have no documents; due to severe financial crisis, the land in which the factory was situated was sold on outright basis by registered sale deed dated 24-3-2006. Though in the counter affidavit, the second respondent states that notices were issued, it is not clear from the counter whether the notices were indeed served on the company or in the absence of service on the company whether the service was effected in accordance with the Rules.

8. Be that as it may, it has to be seen as to whether the amount which has

become due and payable pursuant to the order-in-original, dated 7-3-2011, could be recovered from the petitioners by proceedings against their personal property. The answer to this question should be in the negative. This view is supported by the decision in the cases of the Vandana Bidyut Chaterjee v. UOI & Ors., (supra), and Anita Grover v. Commissioner of Central Excise & Ors., (supra). "Defaulter" as defined under Rule 2(6) of the said Rules means any person from whom Government dues are recoverable under the Act. Therefore, recovery can be made only against the defaulter by following the procedure under the Rules.

9. Admittedly, the defaulter in the instant case is the company. Being conscious of this fact in the counter affidavit, the second respondent refers to the petitioners, as the petitioners-importers. It has to be clarified at this juncture, the importer is the company and the first petitioner was its Managing Director. Therefore, it would not make the petitioners as importers in the eye of law, since the company is a separate legal entity. The fact that the company has not been wound up has been stated by way of an affidavit by the first petitioner. This has not been disputed by the Department.

10. Thus, in the absence of any specific provision under the Customs Act for recovery of the dues of the company from the Directors in their personal capacity, the impugned notice of attachment should be held to be bad in law. Therefore, the respondents having admitted that the dues are payable by the company, then it goes without saying that the recovery could be made only against the company and not against the Directors in their personal capacity.

11. The decision relied on by the learned Senior Standing counsel for the respondents in the case of Textoplast Industries v. Additional Commissioner of Customs, (supra), arose under different circumstances with regard to the offences committed by the companies and the said decision cannot be made applicable to the facts and circumstances of the case on hand, as we are not concerned about the scope of Section 140 of the Customs Act in the present case.

12. In the light of the above, the Writ Petition is allowed and the impugned notice of attachment is quashed. Leaving it open to the respondents to initiate recovery proceedings against the company. No costs. Consequently, connected Miscellaneous Petition is closed.