

Santanu Ray Vs. Union of India

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Court : Delhi

Decided On : Aug-12-1989

Reported in : [1989]65CompCas196(Delhi)

Judge : S.N. Sapra and; S.S. Chadha, JJ.

Acts : [Companies Act, 1956](#) - Sections 75, 95, 144, 145, 162(1) and 220(3); Central Excises Act, 1944 - Sections 3 and 11A; Central Excise Rules, 1944 - Rule 221

Appellant : Santanu Ray

Respondent : Union of India

Advocate for Pet/Ap. : Mr. Soil Sorabjee

Judgement :

S.S. Chadha, J.

1. The petitioners in this petition under articles 226 of the Constitution of India are directors of M/s Duncans Agro Industries Ltd (for called 'Duncans') and have raised, in addition to the grounds of challenge as are in C W P No 1039 of 1987- Duncans Agro Industries Ltd v Union of India, a further ground that there is no provision in the Central Excises and Salt Act, 1944 (hereinafter called 'the Act'), or the Central Excises Rules, 1944 (hereinafter called 'the Rules'), by which

individual directors of a limited company can be made personally liable or responsible for the payment of excise duty or be subjected to penalties. For the reasons recorded in C W P 1039 of 1987, we repel the common contentions raised.

2. The impugned show-cause notices have been issued in exercise of the powers conferred by section 11A of the Act. Under section 11A, where any duty of excise has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reasons of fraud, collusion or willful mis- statement or suppression of facts, or contravention of any of the provisions of the Act or the Rules with intent to evade payment of duty by such person or his agent, then proceedings can be initiated by issue of a show-cause notice. The notice is required to be served on the person chargeable with duty. Under section 3 of the Act, there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India. The duty is levied on the manufacturer or producer. Under rule 178 of the Rules, licenses are granted in favor of named persons for the conduct of the business of the manufacture or production of excisable goods. Rule 7 of the Rules provides that every person who produces, cures or manufactures any excisable goods shall pay the duty or duties leviable on such goods. The time and manner of payment of duty is contained in rule 9. If any excisable goods are, in contravention of sub-rule (1), deposited in, or removed from, any place specified therein, the producer or manufacturer thereof shall pay the duty leviable on such goods on written demand made within the period specified in section 11A of the Act by the proper officer, whether such demand is delivered personally to him, or is left at his dwelling house and shall also be liable for confiscation. Under rule 49 of the Rules, the duty chargeable is on removal of the goods from the factory premises or from an approved place of storage.

3. Mr. Soil Sorabjee, learned counsel for the petitioners, after inviting our attention to these statutory provisions, split up the challenge into two, namely, (1) with regard to the claim for duty from individual directors, and (2) with regard to the threat to impose personal penalty on individual directors. He says that a reading of these provisions shows that the liability, obligations and responsibility to pay

excise duty is cast on the person who manufactures or produces any excisable goods and the expression 'manufacturer' refers to a person who has been granted a license for the conduct of the business of manufacture or production of excisable goods. Under rule 174, the person who requires the license is a manufacturer and in this case it is Duncans who have obtained the license and they alone are chargeable to excise duty, if any. This is for the obvious reason that there can be no taxation by implication or without express authority of the law. The Act and the Rules constitute a self-contained code for the chargeability of excise duty and its recovery and it is, therefore, not permissible to travel outside these for imposition and collection of excise duties and penalties. There is no question of applying any principle from the law of torts to fix a statutory fiscal liability. Ordinarily, it is only the manufacturer who is required to make an application for the grant of a license and the consequential declaration in the application for such license. Where the trade and business of manufacture is carried on by the corporation which is the manufacturer, the declaration that is required to be made is also to be countersigned by the chairman or director or secretary or other principal officer of the corporation. It is only under rule 221 of the Rules that the person signing such a declaration, along with the corporation, becomes liable for the payment of all dues, charges, or penalties or confiscation incurred in respect of the trade or business to which the declaration relates. Mr. Soli J Sorabjee invites our attention to the affidavit-in-re-joinder that none of the petitioners has signed any declaration under rule 221. There is thus no jurisdiction at the threshold to issue a showcase notice to the directors for payment of dues and penalties.

4. Counsel further submits that the stand of the respondents on lifting the corporate veil on the ground that the corporate entity cannot be considered to be the manufacturer or producer and it can also be persons who run that corporation through their will and brains who are the real manufacturers or producers who are alleged to have been indulging in nefarious activities like evasion of duties, is not sustainable. There is no specific provision in the Act or the Rules like section 179 of the Income-tax Act, 1961, or the [Companies Act, 1956](#), such as section 75, 95, 144, 145, 162(1), 220(3), etc. Reliance is placed on *Ramachandran v State of Kerala* [1984] 55 Comp Case 590 (Ker), wherein it was held that there is no provision of law which enables the Revenue to proceed against a director of a

company personally for arrears of sales tax due under the Kerala General Sales Tax Act, 1963, from the company since the company is a different and distinct legal entity.

5. Another submission is that there is no warrant for invoking the law of contracts or the law of torts in relation to the show-cause notices which have been issued under the Act and the Rules. The principle of agency arises in matters of contract and the purpose of describing a director as agent of the company is to make the company liable for contracts entered into by directors on its behalf as such agents. This is clear from section 230 of the Contract Act. Reliance is placed on *Ferguson v. Wilson* [1866] LR 2 Ch App 77, wherein it was held:

'What is the position of directors of a public company? They are merely agents of a company. The company itself cannot act in its own person, for it has no person; it can only act through directors, and the case is, as regards those directors, merely the ordinary case of principals and agent. Wherever an agent is liable, those directors would be liable; where the liability would attach to the principal and the principal only, the liability is the liability of the company.'

6. With regard to the threat of imposing personal penalty on individual directors, our attention is invited to the penal provisions contained in rules 9(1), ((2), 52A(1), 53, 210 and 226 invoked in the two show-cause notices. The submission is that *ex facie*, none of the rules apply to individual directors. A penalty can be imposed on persons on whom a duty is cast by the statute or specifically mentioned as persons liable to excise duty and not others. Counsel concludes that it is not permissible or legitimate to stretch the language of penalty. Reliance is placed on *Union of India v. Rai Bahadur Sreeram Durga Prasad (P) Ltd.* [1971] 41 Comp Case 864 (SC), wherein some judgments are quoted with approval (at page 886):

'In *London and North Eastern Ry Co. v. Berriman* [1946] AC 278, Lord Macmillan observed:

'Where penalties for infringement are imposed it is not legitimate to stretch the language of a rule, however beneficent its intention, beyond the fair and ordinary meaning of its language.'

This court in *Tolaram Relumal v. State of Bombay* : [1955]1SCR158 , speaking through Mahajan C. J., observed:

`It is not competent to the court to stretch the meaning of an expression used by the Legislature in order to carry out the intention of the legislature."

7. On the other hand, Mr. G. Ramaswamy, learned Additional Solicitor-General, submits that the show-cause notices have been issued under section 11A of the Act as the duty of excise has not been levied or paid or has been short-levied or short-paid by reason of fraud, collusion or willful mis- statement or suppression of facts, or contravention of any provisions of the Act and the Rules made there under with intent to evade payment of duty by Duncans and/or its directors and/or their agents. The act of the company under the control of the board of directors is the subject-matter of the show-cause notices. The show-cause notices have been issued against the company and its directors through whom the company conducts its affairs and who are responsible for all the misdeeds and contravention of law. He submits that the court should lift the corporate veil as it is evasion of excise duty as was done in *CIT v. Sri Meenakshi Mills Ltd.* : [1967]63ITR609(SC) and *Assistant Registrar of Companies v. Southern Machinery Works Ltd.* [1986] 59 Comp Case 670 (Mad).

8. The main purpose of the issue of the show-cause notices, in our view, is to afford the petitioners an opportunity to explain their stand in respect of the allegations contained against them therein to enable the adjudicating authority to come to the conclusion as to who is liable for the payment of excise duty or who is responsible for its evasion. Whether both the companies, or the directors of both the companies, namely, Duncans and NTC, or which of them are wholly or partly responsible for:-

(i) removing fully packed excisable cigarettes from the places of production in a manner otherwise than provided and thus illicitly cleared them without payment of Central excise duty thereon ;

(ii) manipulating, duplicating accounts;

- (iii) by maintaining machine production cards with incomplete essential particulars;
- (iv) by not accounting for fully the production of cigarettes recorded in machine cards;
- (v) by not accounting for fully the cut tobacco resulting in ripping operations of cigarettes and also unused tobacco and the production of cigarettes there from;
- (vi) falsely recording dispatches and sales of tobacco but actually utilising the same for manufacture of cigarettes;
- (vii) falsely recording storage losses of tobacco and utilising the same for manufacture of cigarettes;
- (viii) falsely recording tobacco as destroyed but utilising the same for the manufacture of cigarettes;

are the very questions to be considered and decided in the adjudication proceedings in pursuance of composite notices. The allegations are that huge evasion of excise duty took place with the specific directions of the Duncans/NTC given by the chairman and top executive and on prima facie material annexed to the show-cause notice. These questions require investigation of facts.

9. Section 3 of the Act provides that there shall be levied and collected in such manner as may be prescribed duties of excise on all excisable goods other than salt which are produced or manufactured in India and a duty on salt manufactured in, or imported by land into, any part of India as, and at the rates, set forth in the Schedule to the Central Excise Tariff Act, 1985. According to the procedure laid down in the Act and the Rules for the levy and collection of excise duty, the incidence of excise duty is on the manufacture or the production. The liability to pay excise duty as well as penalty is on the manufacturer or producer. Section 4 provides for the valuation of excisable goods for purposes of charging of duty of excise. Under sub-section (4)(a) of section 4, an assessed means the person who is liable to pay the duty of excise under the Act and includes his agent. Rule 2(i)(ib) defines assessed as any person who is liable for payment of duty assessed and also includes any producer or manufacturer of excisable goods or a licensee

of a private warehouse in which excisable goods are stored. Rule 221 reads as under:

'221. Responsibility of a corporate body for making declaration and obtaining license-(1) Where any trade or business in respect of which declaration is required to be made by these rules, is carried on by a corporation, the declaration shall be under the seal of the corporation and signed by the chairman or some director of the corporation or by its secretary or other principal officer.

(2) Any person signing a declaration, and also the corporation under whose seal the declaration is made, shall be liable for the payment of all duties charged and to all penalties and confiscations incurred, in respect of the trade or business to which the declaration relates.

(3) A declaration in respect of a trade or business carried on by a corporation shall be treated as being under the seal of the corporation if it is signed by some person authorised in the behalf by the corporation under its seal.'

10. Rule 9 provides for the time and manner of payment of duty. No excisable goods can be removed from any place where they are produced, cured or manufactured or any premises appurtenant thereto, which may be specified by the Collector in this behalf, whether for consumption, export or manufacture of any other commodity in or outside such place, until the excise duty livable thereon has been paid at such place and in such manner as is prescribed in the Rules or as the Collector may require, and except on presentation of an application in the proper form and on obtaining the permission of the proper officer on the form. There are certain exceptions. If any excisable goods are, in contravention of subrule(1) of rule 9, deposited in, or removed from, any place specified therein, the producer or manufacturer thereof is liable to pay the duty livable on such goods upon written demand made within the period specified in section 11A of the Act by the proper officer, whether such demand is delivered personally to him or is left at his dwelling house, and is also liable to a penalty which may extend to two thousand rupees, and such goods are also liable to confiscation. There are several provisions in the Rules which require the making of the declarations such as rule 39 requiring the making of the declaration of premises by persons purchasing and

storing unmanufactured tobacco; rule 44 empowering a Collector to require the manufacturer to make prior declaration of factory premises and equipment; rule 47 permitting the storage of manufactured goods without payment of duty in such store room or place as may be declared by the manufacturer and approved by the Collector; rule 53 imposing the duty on every manufacturer to maintain a stock account in such form as the Collector may in any particular case or class of cases allow and the duty of the manufacturer to furnish a declaration in the form annexed thereto; rule 174 laying down the requirement to take out license by any manufacturer, trader or person mentioned therein; and rule 176 laying down the requirements of making an application for grant and renewal of licenses in Form (a) or (1) and the declarations made there under. As provided in rule 221, any person signing a declaration, and also the corporation under whose seal the declaration is made, shall be liable for the payment of all duties charged and to all penalties and confiscations incurred, in respect of the trade or business to which the declaration relates. We are unable to accept the averment of the petitioners in the rejoinder that no declaration has been made by any of the petitioners. This is a question which has to be investigated and adjudicated upon by the adjudicating authorities. The requirement of rule 233A is the issue of show-cause notice before any penalty can be imposed on any person under the Rules. Rule 232A enjoins upon the Collector to publish names and other particulars of the person, inter alia, on whom penalty of Rs. 10,000 or more has been imposed by the Collector. In consonance with the principles of natural justice and the rule of audi alteram partem, the petitioners are being given an opportunity to show-cause as to why they are not liable for payment of all duties charged and to all penalties incurred in respect of the trade or business to which those declarations relate.

11. Any director who is a party to the fraud or to the commission of any other tort is personally liable. In *Palmer's Company Law*, 23rd edition, in the chapter dealing with the 'Liability of directors to outsiders', it is expressed:

'Any director who is a party to a fraud or to the commission of any other tort is personally liable to the injured party. This is on the principle that whoever commits a wrong is liable for it himself, and more the less so that he was acting as an agent or servant on behalf, and for the benefit, of another; for the contract of agency or

service cannot impose any obligation on the agent or servant to commit, or assist in the committing of, fraud or any other wrong. The company may also be liable, but that does not exonerate the director. So, too, if, by the order of the directors, a trespass is committed, a patent infringed, or another wrongful act committed, the directors who are parties to it are personally liable. If more than one person concerned in the commission of a wrong, the person wronged has his remedy against all, or any one or more of them, at his choice; for every wrongdoer is jointly and severally liable for the whole damage, and it does not matter whether they acted as between themselves as equals, or one of them as agent or servant of another.'

12. In Pennington's Company Law, 5th edition, at page 58, the topic of evasion of obligation imposed by law is discussed. The courts have ignored separate legal personality of the company if it was formed or used to facilitate the evasion of legal obligations. The American courts have disregarded a company's separate legal personality when it was clearly formed or acquired to facilitate a breach of the general law. In CIT v, Meenakshi Mills Ltd., : [1967]63ITR609(SC) , their Lordships expressed that it is well established that in a matter of this description, the income-tax authorities are entitled to pierce the veil of corporate entity and to look at the reality of the transaction. It is true that from the juristic point of view, the company is a legal personality entirely distinct from its members and the company is capable of enjoying rights and being subjected to duties which are not the same as those enjoyed or borne by its members. But, in certain exceptional cases, the court is entitled to lift the veil of corporate entity and to pay regard to the economic realities behind the legal facade. So it is permissible to lift the corporate veil of Duncans to determine whether a particular director could be proceeded against in pursuance of the impugned show-cause notice or whether he is liable for the payment of all duties charged and to all penalties incurred.

13. We can only say that after the veil of the corporate entity is lifted, the adjudicating authorities will determine as to which of the directors is concerned with the evasion of the excise duty by reason of fraud, collusion or willful mis-statement or suppression of facts, or contravention of the provisions of the Act and the Rules made there under. So far as individual liability of a director to the

payment of excise duty and penalty is concerned, no liability can be fastened on him unless the department is able to show as to how and to what extent a particular director is liable. We wish to say no more at this stage.

14. Before parting with this case, we may note the contention of the petitioners that section 9AA cannot be invoked in adjudication proceedings as it relates only to criminal proceedings. Section 9AA, which was introduced with effect from December 27, 1985, cannot be invoked in adjudication proceedings as it relates only to criminal proceedings. In all fairness to Mr. Ramaswamy, he conceded that the stand in para 4(e) of the counter-affidavit of the respondents is not correct with the result that the respondent will not rely on section 9AA of the Action in the adjudication proceedings.

15. For the above reasons, the writ petition fails and is dismissed with no order as to costs.