* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Judgement reserved on: 06.09.2013
Judgement pronounced on:16.09.2013

\+ **W.P.(C) 168 of 2011 & W.P.(C) 7725 of 2011**

VED KAPOOR ….Petitioner

Through: Mr. Dhruv Mehta, Sr. Adv. with
Mr. Ashish Wad, Ms. Kanika Bhutani,
Ms. Niharika Bapnu &
Mr. Sameer Abhyankar, Advs.

Versus

UNION OF INDIA & ORS. ….Respondents

Through: Ms. Rajdeepa Behura &
Ms. Monica Gupta, Advs.

CORAM:
HON'BLE MR. JUSTICE V.K. JAIN

V.K. JAIN, J.

M/s. Hitkari China Limited (for short 'the Company'), in which the petitioner before this Court claims to be a Director till 9.4.2005, applied to the Joint Director General, Foreign Trade (for short 'JDGFT') on 8.5.1997, for grant of advance licence for import of certain goods. An advance licence dated 28.8.1997 was issued to the Company allowing import to the extent of CIF value of Rs.50,38,267/- (US$ 139952/-), subject to the condition that the Company would fulfill

export obligations for Rs.1,24,25,099/- within eighteen (18) months from the date of issue of the said licence. The goods imported against the said licence were to be utilized in accordance with the provisions of export and import policy and custom notification Nos.30/97 & 31/97 both dated 1.4.1997 as amended from time to time.

2. The aforesaid Company, however, did not honour the export obligations subject to fulfillment of which the import licence was issued. A show cause notice dated 17.3.2004 was then issued to the Company requiring it to furnish documents mentioned in the said notice, which primarily would be the documents evidencing fulfillment of the export obligations attached with the advance licence and intimating that in case it failed to furnish any of the documents mentioned in the notice, it should show cause as to why action should not be taken against it *inter alia* to declare it as a defaulter in fulfillment of export obligations. The aforesaid notice was followed by identical notices dated 21.7.2005 and 12.2.2008. Vide order dated 28.3.2008, the aforesaid Company was declared defaulter in non-fulfillment of export obligations against the advance licence dated 28.8.1997 and the concerned Section was instructed not to allow four (4) Directors of the Company namely, Ved

Kapoor, K.P. Kapoor, Satish Mathautra and Jaiwant Bery, to avail of licence of any category and any other benefit under the Exim Policy. The aforesaid order was followed by an adjudication order dated 31.5.2010 whereby a penalty of Rs.2,51,81,335/- was imposed upon the Company along with interest @ 15 per cent per annum from the date of the first import bill, till payment to the Government.

3. Since the amount of penalty was not paid, a recovery notice dated 22.11.2010 was sent to the Government of NCT of Delhi for recovery of the aforesaid amount from the defaulting Company and/or its Directors namely, Ved Kapoor, K.P. Kapoor, Satish Mathautra and Jaiwant Bery, as arrears of land revenue. Based upon the recovery notice sent to the Government of NCT of Delhi, the Assistant Collector first, issued a notice dated 16.12.2010 to the aforesaid four (4) persons namely, Ved Kapoor, K.P. Kapoor, Satish Mathautra and Jaiwant Bery, requiring them to deposit the amount of Rs.2,51,81,335/-. Being aggrieved from the said notice, WP (C) No.168/2011 was filed by Shri Ved Kapoor, one of the four (4) persons to whom the said notice dated 16.12.2010 was addressed, seeking quashing of the notice and other proceedings that might have been initiated against him. When counter affidavit in WP

(C) No.168/2011 was filed by the respondents, bringing the facts as stated hereinabove to the notice of the Court, WP (C) No.7725/2011 was filed by him impugning the defaulter order dated 28.3.2008 and adjudication order dated 31.5.2010.

4. In WP (C) No.168/2011, the petitioner had referred to a show cause notice dated 7.3.2008, which he had responded to on 14.3.2008. It was, however, clarified in the counter affidavit that the show cause notice dated 7.3.2008 had nothing to do with the adjudication order dated 31.5.2010. In fact, as many as three (3) advance licences were obtained by the Company. The adjudication order dated 31.5.2010 pertained to non-fulfillment of export obligations in respect of advance licence No.0085811 dated 28.8.1997 whereas the show cause notice dated 7.3.2008 pertained to non-fulfillment of export obligations in respect of advance licence No.2274981 dated 12.12.1995.

5. Section 11 of the Foreign Trade (Development and Regulation) Act, 1992 (hereinafter referred to as 'the said Act'), to the extent it is relevant reads as under:

> "**11. Contravention of provisions of this Act, rules, orders and export and import policy. -**
>
> (1) No export or import shall be made by any person except in

accordance with the provisions of this Act, the rules and orders made thereunder and the export and import policy for the time being in force.

(2) Where any person makes or abets or attempts to make any export or import in contravention of any provision of this Act or any rules or orders made thereunder or the export and import policy, he shall be liable to a penalty not exceeding one thousand rupees or five times the value of the goods in respect of which any contravention is made or attempted to be made, whichever is more.

xxxx xxxx xxxx xxxx xxxx

(4) A penalty imposed under this Act may, if it is not paid, be recovered as an arrear of land revenue and the Importer – exporter Code Number of the person concerned, may, on failure to pay the penalty by him, be suspended by the Adjudicating Authority till the penalty is paid."

Section 14 of the said Act reads as under:

"**14. Giving of opportunity to the owner of the goods etc. —** No order imposing a penalty or of adjudication of confiscation shall be made unless the owner of the goods or conveyance, or other person concerned, has been given a notice in writing -

(a) Informing him of the grounds on which it is proposed to impose a penalty or to confiscate such goods or conveyance; and

(b) To make a representation in writing within such reasonable time as may be specified in the notice against the imposition of penalty or confiscation mentioned therein, and, if he so desires, of being heard in the matter."

6. A perusal of the adjudication order dated 31.5.2010 would show that penalty under Section 11 (2) of the said Act has been imposed upon the petitioner, the same having been imposed only upon the Company. Even otherwise, no penalty could have been imposed upon the petitioner, without serving him with a mandatory notice in terms of Section 14 of the Act and no such notice was ever given to the petitioner. A perusal of the show-cause notices dated 17.03.2004, 21.07.2005 and 12.02.2008 would show that all of them are addressed only to the Company. The notice issued to the Company can by no stretch be construed as notice to its directors, since it contained no proposal to impose penalty on the directors of the company. Even if it is presumed, for the sake of arguments, that the aforesaid notices were in the knowledge of the petitioner, though his case is that the said notices were not served even on the Company, the same having been dispatched to a place where the Company was no more functioning at the time the notices were dispatched, he could not have anticipated from the said notice that penalty in terms of Section 11(2) of the Act was sought to be imposed upon him as well. In any case, as noted earlier, no penalty was ever imposed upon the petitioner. During the course of hearing, the

learned counsel for the petitioner brought it to my notice that from the letter dated 23.03.2008, which is a document filed by the respondents, it is evident that one Mr Satish Malhotra, who appeared in the office of Joint Director General of Foreign Trade on 12.03.2008, had informed him that the company was lying closed since 1998 and the said office had sent various letters at Tolstoy Marg, New Delhi and Faridabad which had ceased to be the office of the company since January, 1998. However, since the Company is not a petitioner in these matters, I need not go into the question as to whether the said notices were duly served upon the company or not.

7. The next question which then arises for consideration is as to whether the penalty imposed upon the Company can be recovered from its Directors of the Company.

8. A company is a legal entity independent of its directors and/or shareholders. The company enjoys its own legal right and can also be subjected to duties, statutory or otherwise. The business carried out by a company belongs to it as a juridical person and it is the company alone which is duty-bound to discharge its debts and liabilities. In the absence of a statutory provision, the directors of a company cannot be made

liable to discharge its liabilities unless they have stood as guarantors for discharge of such a liability. Therefore, unless a Statute so provides, the penalty imposed upon a company cannot be recovered from the personal assets of its directors. Reference may be made to a Division Bench judgment of Punjab & Haryana High Court in ***A.P. Raheja and Anr. vs. State of Haryana and Ors.*** *[2010]154CompCas449 (P&H).* In the aforesaid case, the petitioner was served with a notice for recovery of sales tax due from the company on the ground that he had been a director of the company. He filed a writ petition, challenging the said notice and contended that the company being a separate entity, recovery cannot be effected from him. Accepting the contention, the High Court held that a company is a complete separate entity and its corporate veil can be lifted only for limited purposes. The directors of the company cannot be a substitute of the company in their individual capacity. Reference may also be made to the decision of this Court in ***Capital Cargo Carriers vs. Assistant Collector Grade-I and Ors.,*** *W.P.(C) No. 10676/2009*, *decided on 04.08.2009*, where this Court took an identical view and held that the directors of the company are not personally liable for the liability owned by the company. It was clearly held that the

directors cannot be held personally liable in financial matters relating to affairs of the company. A similar view taken by the Division Bench of this Court in ***Anita Grover vs Commissioner of Central Excise and Ors.*** *196(2013)DLT598*, when it was held that the dues recoverable from the company cannot be, in the absence of a statutory provision, be recovered from the directors. There is no provision in the Act for recovery of the penalty imposed upon a company from its directors, even in the event the said penalty cannot be recovered from the Company. Therefore, the penalty imposed upon the company cannot be enforced against the petitioner.

9. Another question which incidentally arises in this case is as to whether, in a case where import licence is issued to a company and there is a default in carrying out the export obligation attached to the licence, penalty in terms of Section 11(2) of the Act can be imposed upon the director of the company or not. The contention of the learned senior counsel was that since the expression 'Person' used in sub-section (2) of Section 11 refers only to the person who makes or abets or attempts to make any export or import and admittedly import in this case was made by the company which is a legal personality independent of its directors,

no penalty against the directors can be imposed on failure of the company to carry out the export obligation attached to the import licence. Per contra, the learned counsel for the respondents contended that in the event of such a default, penalty can be imposed on all the persons, who were directors of the company at the time the default took place as well as the persons who were directors during the period the default persisted.

10 No doubt, a company being an independent entity ordinarily, the directors of the company are not liable to discharge the liabilities of the company. However, in certain cases, the Courts can lift the corporate veil, *inter alia,* in the cases where a) the Statute itself contemplates such lifting; b) fraud or improper conduct is intended to be prevented and; c) where a taxing statute or a beneficial statute is sought to be evaded. The nature of the impugned conduct, the extent of public interest involved and effect on the effected parties would be amongst the relevant considerations, while deciding whether to lift the corporate veil or not.

In ***Santanu Ray vs. Union of India*** *1988(38) E.L.T. 264 (Del.)*, the petitioners were served with notice under Section 11A of Central Excise and Salt Act, 1944, which provides that 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 was challenged, *inter alia,* on the ground that the Statute imposed no liability, obligation and responsibility upon the directors of the company to pay the excise duty in a case where manufacture is a company and, therefore, the show-cause notice, issued to the directors were without jurisdiction. Dealing with the contention, a Division Bench of this Court held as under:-

> "11……..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 to the impugned show-cause notices or whether he is liable for the payment of all duties charged and to all penalties incurred.

> 12. We can only say this 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."

In ***Krishan Kumar Bangur vs. Director General of Foreign Trade*** *2006 (88) DRJ 680*, a company had obtained EPCG licence which carried a condition to export to the extent of four times of CIF value, within a period of five years. The said obligation, however, was not fulfilled. On detecting the failure, notices were issued to the company as well as its directors. It was contended by the appellant that he was not a whole time director and had nothing to do with the day-to-day working. The legal question which arise before the Court was whether solely on the strength of the petitioner being a director of the company, he can be held individually liable for the prosecution/punishment for non-fulfilment of the obligation. Relying upon *Santanu Ray* (supra), this Court, *inter alia,* held as under:-

> "14. In order to sustain the imposition of a punishment on an individual Director it was incumbent on the Respondents to allege and assert the existence of a duty or obligation cast on one or all the Directors of the defaulting Company and the contumacious failure to fulfill it. The Show Cause Notice does not mention the grounds on which individual liability is sought to be fastened on the Director. Neither of the Orders, that is, the Order in Original or the Appellate Order, disclose reasons which have persuaded those Authorities to come to the conclusion that the Petitioner had assumed an obligation or duty in ensuring that exports corresponding to four times the CIF value would be undertaken within the prescribed period. To assume or foist such a liability on the Directors would run counter to the basic tenets of Company law."

11. In view of the legal proposition enunciated in the above-referred cases, the respondents would be competent to proceed against the petitioner under Section11(2) of the Act, if they are of the opinion that he was under a duty or obligation to fulfil the export obligation of the company and consciously failed to do so. Of course, in such a case, it would be incumbent upon the respondents to issue a notice under Section 14 of the Act to him, stating therein the ground on which such a liability is sought to be fastened on him. Such an obligation cannot be assumed merely on account of the petitioner being or having been a director of the company.

12. For the reasons stated hereinabove, both the writ petition are disposed of with a direction that the penalty imposed upon M/s. Hitkari China Limited shall not be enforced against the petitioner, though it can certainly be enforced against the company. This order, however, shall not come in the way of the respondents proceeding against the petitioner, under Section 11(2) of the Act, in terms of this order.

In the facts and circumstances of the case, there shall be no order as to costs.

SEPTEMBER 16, 2013 V.K. JAIN, J.
b'nesh/BG