

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO.715 OF 2019

Purshottam Das Gupta,
Aged 86 years, residing at
9, Varsha Building,
69, Napean Sea Road,
Mumbai - 400 006.

.... Petitioner

- Versus -

1. The Union of India
through the Secretary,
Ministry of Finance,
Department of Revenue,
North Block,
New Delhi – 110 001.

2. The Commissioner of Customs
(Import-I), Tax Recovery Cell,
having its office at
New Customs House,
Ballard Estate,
Mumbai – 400 001.

3. The Assistant Commissioner of
Customs (Import-I), Tax Recovery
Cell, having his office at
New Customs House,
Ballard Estate,
Mumbai – 400 001.

.... Respondents

Mr. Prakash Shah with Mr. Jas Sanghavi & Mr. Suyog
Bhave i/by PDS Legal for the Petitioner.
Mr. Pradeep S. Jelty with Mr. Jitendra Mishra for
the Respondents.

CORAM: S.C. DHARMADHIKARI &
M.S. KARNIK, JJ.

DATE : FEBRUARY 15, 2019

ORAL JUDGMENT (Per Shri S.C. DHARMADHIKARI, J.):

1. **Rule.** The respondents waive service. By consent, Rule is made returnable forthwith and the petition is taken up for hearing and final disposal. Heard counsel.

2. The senior citizen/petitioner before us was at one time a Director of a limited company, Sujata Verbatim Limited. The company has now changed its name and is now known as PDG Infotech Limited.

3. This company was incorporated on 24-12-1985 and its name underwent a change sometime in April, 2004. The nature of business and the place from which the company carried out its activities are mentioned in para 5, and then it is stated that the company stopped its manufacturing activities and thereafter even the petitioner ceased to be a Director of the

company. Reliance is placed upon documents and records available in the office of the Registrar of Companies, State of Maharashtra, which, according to the petitioner, prove the point that the petitioner has no association with the company.

4. It is then alleged that there was an adjudication and stated to be into the matter of recovery of taxes, particularly the customs duty.

5. The fact that there were some legal proceedings became known to the petitioner only after he was confronted with a communication from the respondents.

6. He says that a demand notice dated 28-12-2018, copy of which is at Exhibit-A, was served on him under which the 3rd respondent directed him to pay outstanding dues of the company, amounting to Rs.2,49,10,040/- along with interest and costs.

7. On failure to pay, it was stated that the respondents would resort to the power conferred by Section 142(1)(c)(ii) of

The Customs Act, 1962 (“the Act” for short) r/w Rule 4 of The Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995 (“the Rules” for short). The demand notice was received on 3-1-2019 and challenging this demand notice and claiming a declaration to the effect that, the dues of the company cannot be recovered from the petitioner even if it is outstanding, this writ petition is filed.

8. Mr. Prakash Shah, appearing on behalf of the petitioner, would submit that merely because the petitioner is associated with the company and has disclosed in the body of the petition the nature of the company's business and alleged activities and the details from where the business was carried, who was associated with him, does not mean that he was in any way liable to meet the outstanding dues and which could have only been claimed and recovered from the company. Asserting the position of a Director *qua* a company or a limited company, it is urged by Mr. Shah that unlike a partnership or a glorified partnership, the dues of the company cannot be recovered from its Director, for the company has an existence independent of

the Director, in law. Unlike a partnership firm, which has no independent existence, the company has and there is enough material available in law which could buttress this submission.

9. Reliance is placed by Mr. Shah on the language of Section 142 of the Act and the relevant Rules and several Judgments of this Court and the Supreme Court compiled in a compilation handed over by him. The said Judgments are as under:-

“1. **S.L. Kirloskar v. Union of India**, reported in 1993 (68) E.L.T. 533 (Bom.),

2. **Vandana Bidyut Chaterjee v. Union of India**, reported in 2013 (292) E.L.T. 6 (Bom.),

3. **Suman N. Agarwal v. Union of India**, reported in 2013 (289) E.L.T. 281 (Bom.),

4. **Sunil Parmeshwar Mittal v. Dy. C. (Recovery Cell), C.Ex., Mumbai-I**, reported in 2005 (188) E.L.T. 268 (Bom.),

5. A Division Bench Order of this Court dated 5-5-2009, passed in **Civil Writ Petition No.4117 of 2009 {Chandrakant Bhalchandra Garware v. The Union of India & Ors.}**, and

6. **Employees' State Insurance Corporation, Chandigarh v. Gurdial Singh and others**, reported in 1991 Supp (1) SCC 204.”

10. On the other hand, Mr. Pradeep Jetly would submit that the communication at Exhibit-A does not allow any party, much less the petitioner, to raise a dispute about the dues of the company. The company owes to the Government this money and its dues are in the form of taxes. After a proper adjudication the amount has been crystalised. The law is very clear in that there is a liability to pay taxes and the adjudication at best determines the quantum. The dues are then crystalised in money and that is done by the adjudicatory process and which the company never questioned. Thus, the orders passed by the Competent Authorities under the Act are final and binding. The question is only of recovery. Mr. Jetly would submit that in this case it is the petitioner who was everything as far as the company is concerned. This is his company exclusively and its predominant share-holders were the petitioner and his wife. There is none other with substantial share-holding but for this couple. It is in these circumstances and when the taxes have been evaded that a show cause notice was issued way back in 1997. There was a personal hearing in the matter and the Order-in-Original is

passed on 26-6-2001. That confirms the above-mentioned dues. Thereafter, this Order was challenged in Appeal but it is common ground that the company throughout was represented by the petitioner. Mr. Jetly heavily relies upon the statements made in the affidavit in reply and urges that in this case a letter was addressed to the Registrar of Companies for information about PDG Infotech Limited. The documents supplied by him indicated that the petitioner, his wife Mrs. Priti Purshottam Das Gupta and Ms Anjali Omprakash Berlia were the only Directors. There was none others and thus this is a company belonging to the petitioner. The petitioner claims to be qualified and competent to carry out the business of the company even after it underwent a change in its name. Therefore, the dues which were crystalised were not interfered with. The Order-in-Original and upheld in appeal throughout can now be challenged.

11. In fact, the remand order from the Customs Excise and Service Tax Appellate Tribunal resulted in another order by the Commissioner of Customs (Appeal) rendered *de novo* on 8-2-2013. Now insofar as that order is concerned, there is no

challenge thereto. It is in these circumstances, Mr. Jetly urged that there being large scale tax evasion, we must allow the demand notice to be enforced and this is a fit case wherein a view other than taken by the Division Bench Judgments should be taken. Mr. Jetly relies upon the order of the Supreme Court in the case of **Bikram Chatterji & Others v. Union of India & Others**, reported in 2018 (11) Scale page 129 and eventually the Judgment in the case of **Subrata Roy Sahara v. Union of India & others**, reported in (2014) 8 SCC 470.

12. For properly appreciating these contentions, we must advert to Section 142 of the Act. That reads as under:-

“142. Recovery of sums due to Government.—
(1) [Where any sum payable by any person] under this Act [including the amount required to be paid to the credit of the Central Government under section 28B] is not paid,—

- (a) the proper officer may deduct or may require any other officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the proper officer or such other officer of customs; or***
- (b) the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] may recover or may require any other officer of customs to recover the***

amount so payable by detaining and selling any goods belonging to such person which are under the control of the [Assistant Commissioner of Customs or Deputy Commissioner of Customs] or such other officer of customs; or

[(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 [Principal 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:]

[Provided that where the person (hereinafter referred to as predecessor), by whom any sum payable under this Act including the amount required to be paid to the credit of the Central Government under section 28B is not paid, transfers or otherwise disposes of his business or trade in

whole or in part, or effects any change in the ownership thereof, in consequence of which he is succeeded in such business or trade by any other person, all goods, materials, preparations, plants, machineries, vessels, utensils, implements and articles in the custody or possession of the person so succeeding may also be attached and sold by the proper officer, after obtaining written approval from the [Principal Commissioner of Customs or Commissioner of Customs], for the purposes of recovering the amount so payable by such predecessor at the time of such transfer or otherwise disposal or change.]

[(d)(i) the proper officer may, by a notice in writing, require any other person from whom money is due to such person or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held, or at or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom the notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before the payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in case the person to whom a notice under this section has been issued, fails to make the payment in pursuance thereof to the Central Government, he shall be deemed to be a defaulter in respect of the

amount specified in the notice and all the consequences of this Chapter shall follow.]

(2) Where the terms of any bond or other instrument executed under this Act or any rules or regulations made thereunder provide that any amount due under such instrument may be recovered in the manner laid down in sub-section (1), the amount may, without prejudice to any other mode of recovery, be recovered in accordance with the provisions of that sub-section.”

A perusal thereof would indicate that it enables recovery of sums due to Government. Now, where any sum payable by any person would mean a sum due and payable to the Government even by an artificial person such as a company in this case. It is stated in the legal provision, that where any sum payable by the person is not paid, the proper officer may deduct or may require any other officer of Customs to deduct the amount so payable from any money owing to such person which may be under the control of the officer or such other officer of Customs. Thus, the provision enables deduction of money owing and payable by the Government to such person. That, therefore, means that appropriation and adjustment is possible as against the monies owed by the Government to such person. It is only because that person has not paid the sum payable to the Government that this

power is conferred. The other way or manner of recovery is that, the Assistant Commissioner of Customs or the Deputy Commissioner of Customs may recover or may require any other officer of Customs to recover the amount payable by detaining and selling any goods belonging to such person, or if the amount cannot be recovered from such person in the manner provided in Clause (a) or Clause (b) of Section 142, then, the Assistant Commissioner or the Deputy Commissioner can 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 arrears of land revenue. The other mode of recovery is set out in sub-clause (ii) of Clause (c) and then there is another manner or mode which is specified in Clause (d).

14. It is by the language of this provision and particularly the employment of the words “such person” and “his

business” that Mr. Jetly would urge that the recovery is possible also from the Director of the company.

15. For our benefit, the petitioner’s counsel has also compiled the Rules styled as The Customs (Attachment of Property of Defaulters for Recovery of Government Dues) Rules, 1995. These Rules contain certain definitions and the definition of the term “Defaulter” is relied upon and it is to be found in Rule 2, Clause (vi). That reads as under:-

“(vi) 'Defaulter' means any person from whom government dues are recoverable under the Act.”

16. Chapter II contains the procedure for attachment of property and Chapter III contains the procedure for sale of property, movable and immovable.

17. Then there are other miscellaneous Rules but what we find is that Section 142 r/w these Rules proceeds on the footing that dues can be recovered by terming even a company as defaulter. The word “person” therefore includes both a natural and artificial person. The question is not only this,

inasmuch as this aspect is clear by the provision itself and we have no doubt in our mind that a defaulter can be a company or any artificial person, as well. The question is, when it comes to an artificial person can its Director be made personally liable, as in this case, for such dues?

18. The law requires a specific provision to be enacted in that behalf. In a decision, which has been rendered by a Division Bench of this Court in **Writ Petition No.4117 of 2009** [*Chandrakant Bhalchandra Garware v. The Union of India & Ors.*], on 5-5-2009, this Court, after relying upon its previous Judgments, held as under:-

“2. The respondents are seeking by communication dated 1st January, 2009 to realise from the petitioner the dues of M/s. Garware Paints Limited.

*3. To make a director liable, there has to be statutory provision under which a director is made personally liable for the dues of a company. This very issue had come up for consideration before a Division Bench of this Court in **Sunil Parmeshwar Mittal vs. Dy. C. (Recovery Cell), C. Ex., Mumbai-I, 2005 (188) ELT 268 (Bom.)**. The learned Division Bench, after considering the law in extenso, has come to conclusion that director is not liable. In the instant case, the petitioner had resigned on 1.12.1994. The bill of entry had been filed on 19.1.1994. However, no statutory provision has been shown under*

*the Customs Act or for that matter under the provisions of Customs (Attachment of Property of Defaulters for recovery of Government Dues) Rules, 1995 making a Director liable for the dues of a company. In our opinion, the Judgment in **Sunil Parmeshwar Mittal** (cited supra) will have to be followed.”*

19. Thus, the view taken by this Court in the earlier decisions has been consistently followed. That has not been departed from and nothing contrary has been shown to us.

20. A Division Bench of this Court in **Sunil Parmeshwar Mittal** (supra) dealt with the position of a Director *vis-a-vis* a limited company and after reproducing the relevant provisions, while dealing with similar argument, it held as under:-

“22. Having heard rival parties, having examined the relevant statutory provisions in the backdrop of the facts emerging from the record, one has to find as to whether the petitioners, former directors of a company are liable to pay the dues of the company under the provisions of the [Excise Act](#). In order to find answer to this question, one has to revert back to the provision of [Section 3](#) of the Excise Act, the analysis of which makes it clear that it provides for levy and collection of the central excise duty as per the Rules framed under the Act. The Section, thus provides for levy and collection. The word 'levy' has been a subject matter of judicial interpretation in the case of [Ujagar Prints v. Union of India](#) [1988 (38) E.L.T. 535 (S.C.) = AIR 1989 S.C. 516]. The term 'levy' has been understood as an expression of wide import so as to include both imposition of tax as well as its quantification

and assessment. The same view is reiterated by the Apex Court in a subsequent Judgment in the case of [Ashok Singh v. Asstt. Collector of Estate Duty](#) [AIR 1992 SC 1756].

23. The term 'collection' is a term used to denote a stage subsequent to the stage of 'assessment' as laid down by the Apex Court in the case of [Central Excise v. National Tobacco Co. of India Ltd.](#) [1978 (2) E.L.T. J416 (S.C.) = AIR 1972 S.C. 2563]. Thus, terms 'levy and collect' means to impose, assess and collect duty under due authority of law. The expression 'levy and collect' are of widest significance and takes within its fold all the proceedings for raising money by the exercise of power of taxation. It means any step taken or any proceeding initiated for the ultimate purpose of determining the liability of the assessee and finally collecting tax from the person liable to pay such tax. As seen hereinabove, [Section 4](#) of the Act provides for valuation of excisable goods for the purposes of charging of duty of excise and makes the assessee; which includes his agent liable to pay the excise duty under the Act. It would be right to say the duty is charged on goods, but the person who is liable to pay the duty is the person known as "the assessee". Clause (a) of sub - [Section \(3\) of Section 4](#) defines assessee exhaustively to mean the person who is liable to pay the duty of excise under the Act and includes his agent. The duty can be recovered from the person who is an assessee within the meaning of definition. Under [Section 6](#) no person can engage in the production or manufacture of any specified goods, included in the First schedule of the Act (now the new Central Excise Tariff) except under the authority and in accordance with the terms and conditions of a licence granted under the Act. If a person produces 'excisable goods' within the meaning of that expression, he has got to obtain a licence under [Section 6](#) of the Act.

24. Examination of the above provisions would unequivocally go to show that none of the provisions makes the former director personally liable to pay excise

duty. *The Act* does not impose any obligation or liability on the former director to pay the arrears of excise duty. If that be so, even the subordinate legislation cannot bring such a person within its fold.

25. Let us now consider: whether the Rules of 1995 in any way makes a former director liable to pay excise duty. If one turns to the provisions of the Rules of 1995, the word 'government dues' is defined to mean any duty, drawback to be recovered from any person or any interest or penalty payable by any person under the Act and has not been paid. The word 'defaulter' has also been defined to mean any person from whom government dues are recoverable under the Act. Rule 3 deals with the issuance of recovery certificate; whereas, Rule 4 provides for issuance of notice. Notice is required to be issued and served upon a defaulter requiring him to pay the amount specified in the certificate issued under Rule 2(iii) within seven days from the date of the service of the notice. As already stated 'defaulter' means a person from whom government dues are recoverable under the Act. None of the provisions under the Rules of 1995 makes the former director responsible to pay the dues of the government. The absolute liability created under the Act and the Rules is of that person who is an assessee i.e. a person engaged in production or manufacture of any specified goods included in I schedule of the Act (now the new Central Excise Tariff). In this view of the matter, in our opinion none of the petitioners were and are liable to pay the alleged government dues either under the provisions of the Act or Rules of 1995.

26. In view of the above findings, it is not necessary for us to deal with the alternate contention raised by Mr. Nankani. However, since both the parties have addressed us on that aspect in detail, we propose to deal with the submission made in this behalf. Mr. Nankani, in our opinion, is perfectly justified in contending that the order passed by the CEGAT in the case of Mr. S.P. Mittal

binds the respondents since a specific finding has been recorded by the Tribunal holding that the order of confirming duty and imposing penalty was only against the company and not against the director Mr. S.P. Mittal. Consequently, his appeal was dismissed for want of locus standi. This order has been accepted by the Revenue. The order has become final and conclusive. The Supreme Court has explained the concept of res judicata in the case of [Sulochana Amma v. Narayanan Nair](#) [1995 (77) E.L.T. 785 (S.C.)]. The principle operates as a bar to try the same issue once over. It aims to prevent multiplicity of proceedings and accords finality to an issue, which directly and substantially had arisen in the former suit between the same parties or their privies, decided and became final, so that parties are not vexed twice over; vexatious litigation is put an end to and the valuable time of the Court is saved. It is based on public policy as well as private justice. The principle would very much apply, to all judicial proceedings whether civil or otherwise. It equally applies to quasi-judicial proceedings of the Tribunals other than the Civil Courts. In this view of the matter, the respondents cannot set up any demand against Mr. S.P. Mittal based on the order dated 22-6-2000 passed against the company - M/s. GTL. The reasons recorded by the CEGAT while rejecting appeal filed by Mr. S.P. Mittal holds good even in the case of Mr. K.T. Shah.”

21. This Judgment only follows what has been held earlier and subsequently.

22. The reliance on the Judgment in the case of the **Employees' State Insurance Corporation** (supra) indicates that this decision of the Supreme Court was rendered while dealing

with the provisions of a distinct statute – The Employees' State Insurance Act, 1948. There Section 2(17)(i) & (iii), and Sections 40 and 41 outline the concept of a Principal employer. In the case of a private limited company having its factory and duly naming an occupier, as also having a Manager, it was still held that the provision is not applicable to the Directors and the company was held to be liable. In the event there being an occupier, such occupier would be personally liable.

23. We do not think that any assistance can be derived by Mr. Jetly from this Judgment or from the general principle that it is possible to pierce the veil of a corporate entity and find out whether it is a glorified partnership. In the present case, according to Mr. Jetly, the piercing of veil has been done and that is why notices have been issued. We are sorry we cannot accept his contention and for more than one reason. This conclusion must be clearly discernible from the orders in the adjudication proceedings, in the sense the show cause notices must be directed to the Director personally and in addition to the corporate entity. Secondly, such corporate entity together

with the Director must be heard and the Director must be granted an opportunity to satisfy the Adjudicating Authority that insofar as the company and its business is concerned, the Director may, as a part and parcel of the Board, lay down broad policies and take decisions in relation thereto but the day-to-day business is not discharged by him. That is carried out by other salaried persons, duly appointed for that purpose. The responsibilities are fixed and it is they who have to discharge their obligations and duties by pointing out to the persons in charge of the finances or in the management of finances, so that the liabilities of the company can be met or dues payable by the company can be paid. Thus there is a team of officials which takes a decision in relation to the day-to-day activities and management so also administration of the policy decisions. Something more than this and proof of involvement not only in the day-to-day activities but all affairs will also have to be placed on record to establish the piercing of veil. The argument now built, only on the basis of this principle and referred in the affidavit in reply is thus of no avail to Mr. Jetly. On that basis,

we cannot hold that the petitioner is also liable for the dues of the company.

24. As a result of the above discussion, the writ petition succeeds. Rule is made absolute in terms of prayer clause (a). We declare that the dues of the company cannot be recovered from the petitioner personally. The demand notice to that extent is quashed and set aside. However, the notice can be pursued by the Authorities and the respondents insofar as the company and its properties and assets. All means of recovery as against the company are, therefore, open to be resorted to by the respondents. No order as to costs.

(M.S. KARNIK, J.)

(S.C. DHARMADHIKARI, J.)