IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.12.2022

CORAM

THE HONOURABLE **DR. JUSTICE ANITA SUMANTH**

W.P.No.16359, 16352, 17511 & 17520 of 2016

WMP.Nos.14984, 14155,14974 & 14158 of 2016

Mr.P.T.Kalaiselvan,
S/o.P.ThalamanChettiar
Assistant General Manager,
Canara Bank Mid Corporate Branch,
No.16 & 18 East Arokiasamy Road,
R.S.Puram, Coimbatore. ...Petitioner in WP.No.16359 of 2016

R.P.Joshua
S/o.A.C.Rayanspillai Joel
Former Chairman Catholic Syrian Bank,
Presently residing at No.51, Church Road,
Maharaja Nagar, Tirnelveli-627 011. ...Petitioner in WP.No.16352 of 2016

Mr.R.Elango
S/o. S.N.Rangasamy,
Assistant General Manager,
United Bank of India,
Regional Recovery HUB Geetha Mansion,
No.40, K.G. Road,
Bangalore-560 001 .....Petitioner in WP.No.17511 of 2016

Mr.RajaniKanta Naik,
S/o Late Bhramarbar Naik
Deputy General Manager,
State Bank of Hyderabad,
Industrial Rehabilitation Department,
Head Office, Gunfoundry,
Hyderabad-500001 .....Petitioner in WP.No.17520 of 2016

Vs.

1.Deputy Director General of Foreign Trade,
Office of the Joint Director General of Foreign Trade,
1544, India Life Building (Annexe), I Floor,
Trichy Road, Coimbatore-641 018

2.M/s. Gangotri Textiles Ltd.
Represented by its Directors,
Having its registered office,
No.35, Robertson Road,
R.S. Puram, Coimbatore-641 002. ...Respondents

Prayer: Writ Petitions filed under Article 226 of the Constitution of India, to issue a Writ of certiorarified mandamus calling for the records of the 1st respondent in the impugned notice vide F.No.32/21/021/00591/AM08 in W.P.Nos.16359, 16352 & 17520 of 2016 & F.No.32/21/021/00001/AM08 in W.P.No.17511 of 2016 dated 19.01.2016 respectively, quash the same and consequently direct the first respondent to drop all further proceedings against the petitioners.

(In all WPs)

For Petitioner : Mr.M.L.Ganesh

For Respondent : Mr.J.Madana Gopal Rao [R1]

No Appearance [R2] –

ORDER

These writ petitions are filed by four individuals, who are all employees of various banks. The petitioner in WP.No.16359 of 2016 was holding the post of Assistant General Manager, Canara Bank Mid Corporate Branch, the petitioner in WP.No.16352 of 2015 was formerly, the Chairman of the Catholic Syrian Bank, the petitioner in WP.No.17520 of 2016, the Deputy General Manager, State Bank of Hyderabad and the petitioner in WP.No.17511 of 2016 is Assistant General Manager, United Bank of India.

2. R2 in all writ petitions is one Gangotri Textiles Ltd. (R2/assessee) that had availed of a scheme promulgated by the Government of India under the Foreign Trade Policy, the Export Promotion Capital Goods Scheme (Scheme/EPCG Scheme). The Scheme entitled a beneficiary to import capital goods and set up manufacturing facilities at concessional rate of customs duty.

3. The grant of this benefit is subject to certain conditions that would have to be satisfied by the assessee, in that, the quantum of export would have to be eight times the customs duty saved. This is to ensure that the revenue that is forgone by the Government in duty, is compensated by the inflow of export earnings. The aforesaid export obligation is a pre-condition to the availment of the benefit under the Scheme.

4. It is the case of the first respondent that R2 had not satisfied the export obligation and it is thus the impugned order has been passed as against the present petitioners. The order refers to certain show cause notices that have been issued, presumably to R2 and its directors, invoking the provisions of Section 140 of the Customs Act, 1962 (in short 'Act').

5. The fate of those proceedings as against company/R2 and it is erstwhile directors was not successful insofar as the company had gone into liquidation. The details of the proceedings initiated are unavailable since the present petitioners

state that they are wholly unconnected and unconcerned with those proceedings and are hence, unaware of the same.

6. Be that as it may, R2 had also availed of financial facilities from banks and had applied for restructuring of the corporate debt. A consortium of banks had approved the restructuring on 26.12.2008, sanctioning the scheme and directing implementation thereof.

7. The Corporate Debt Restructuring (CDR) empowered group comprised various Banks, that is, the State Bank of India, Syndicate Bank, State Bank of Travancore, State Bank of Hyderabad, United Bank of India, Canara Bank, Corporation Bank, State Bank of Mysore and IDBI Bank Limited.

8. The State Bank of India was identified as the Monetary Institution and the other banks as above, were to be joint lenders in the CDR empowered group. The CDR Cell, Mumbai, under communication dated 06.01.2009 approved the restructuring proposal and consequently, a Master Restructuring Agreement had been executed on 26.03.2009 along with a Trust Retention Agreement in favour of the Monitoring Institution and joint lenders.

9. It is pursuant to this and in line with the procedure normally followed, that the present petitioners had been appointed as nominee directors to oversee the performance of the company and to liquidate the liability of the CDR Banks. They have, admittedly, not received any show cause notice/notice prior to passing of the impugned order by the Deputy Director General of Foreign Trade/R1 fastening

liability upon them for non-adherence to the terms and conditions of the EPCG Scheme.

10. Section 140 of the Customs Act, stipulates that, any person, who, at the time of offence was committed by a company, shall be deemed to be guilty of the offence and liable to be proceeded with and punished accordingly.

11. Section 2(13) of the Companies Act, 1956 defines a 'director' to include any person occupying the position of director, by whatever name called. Thus, R1 would advance the argument that nominee director would also satisfy the definition of director, which is a wide one, as they have been occupying such position.

12. However, in my considered view, the provisions of Section 2(13) cannot be read to implicate any person who would be exposed to liability under Section 140, unless it is established by the respondents that the person concerned, the nominee directors in this case, were in charge of the conduct of the business at the time when the offence was committed. This is notwithstanding the position that the persons concerned did occupy the position of nominee director, long after the relevant time when the incident in question took place.

13. The offence in question took place in 2007 and the export obligation was to be satisfied within a period of eight years from the date of issue of the license. In this background the issue that arises for consideration is as to the

liability of nominee/independent directors on the Board of the company, and is an issue that assumes some importance.

14. I thus outline briefly, the position assumed by a nominee director and the contiguous liabilities, both in the context of Companies Act, 1956 as well as the Companies Act, 2013. A director is defined under Section 2(13) of the 1956 Act as including *'any person occupying the position of director, by whatever name called'.*

15.There are no specific provisions under the 1956 Act that deal with other kinds of directors, such as executive or nominee/independent directors and their liability, barring Section 408 that provides for the appointment of the latter by the Government, in the specific context of mismanagement or oppression.

16. Circulars/clarifications have been issued from time to time by the Ministry of Corporate Affairs (MCA) to clarify the roles assumed by nominee directors, including in the context of the 1956 Act, and useful reference may be made to a Master Circular issued in regard to prosecution of such directors, being Circular No.1 of 2011 dated 29.07.2011.

17. The Circular is specific to prosecution launched as against directors for violation under the Companies Act, 1956 and refers to an earlier Circular No.6/98 dated 12.11.1998, wherein clarifications were provided in regard to punishment of officers in default.

18. The Master Circular makes it clear that, prior to initiating penal action under the Companies Act as against the directors, the Registrar of Companies must examine and verify (i) the role played by the director in the incident in question (ii) the timing of the commission of offence to identify responsibility of the director (iii) whether the incurrence of obligation of liability is in the context of specific discharge of duties (iv) whether the director has acted in good faith. Thus there should be proper application of mind in deciding whether an officer is to be implicated as an 'officer in default'.

19. The 2013 enactment is more expansive in its scope and detail, taking into account both permanent as well as independent/nominee directors and their roles in the conduct of business. A nominee director is defined under Explanation to Section 149(7) to mean a director nominated by any financial institution in pursuance of the law for the time being in force or under any agreement or by the Government or any other person who represents its interest.

20. Their liability in terms of Section 149(12) would only extend to acts of omission and commission of a company where such acts have been committed with the express knowledge or consent of the director in a meeting of the Board attended by him.

21. General circular issued by the MCA in March 2020 clarifies that no civil or criminal proceedings be initiated as against nominee/independent directors, unless there is sufficient information available by way of evidence to implicate

their participation in the acts of omission and commission. This circular also recognizes the position that a nominee/independent director would not be held responsible for normal day to day functioning of company or any acts that were beyond their control.

22. In the present case all directors have been appointed as nominees from among the consortium of banks to oversee the adherence of the company to its financial obligations. Their role and responsibility is thus specific and this is the context against which the liability cast in terms of Section 140 of the Companies Act, has to be tested.

23. While there may be some justification in implicating a nominee director for statutory violations that are current, the violation in question touches upon alleged non-compliance with the terms EPCG licence issued in 2010, long prior to their appointment.

24. No doubt, the terms of the EPCG licence required the assessee to comply with export obligations for a period of eight years after date of licence. However, at the time when such nominee directors were appointed such obligations would not have been at the forefront and there is no justification in expecting the newly appointed directors to apply their minds to the obligations that had crystallized long prior to their appointment and previously in time.

25. Bearing in mind their pointed and focused mandate to oversee the financial working of the assessee, I believe that it would be improper, unjustified

and unwarranted to expect them to have had any participation or involvement in compliance with the continuing export obligation.

26. It is perhaps for this reason that the respondents have also dropped the proceedings as against the present petitioners as is clear from a communication that has been addressed to the learned counsel for the respondents wherein at para 2, the officer states as follows:

> *After the Appeal dismissed, this Office has issued revised Recovery Order dated starting from 21.10.2019 to other dates in the month of October and November 2019 in 45 files. This Recovery Order was issued to M/s. Gangotri Textiles & its Directors viz. 1) Shri Manoj Kumar Tibrewal 2) Shri Mohanlal Tibrewal 3) Shri Ullas R. Sangvi 4) Shri R.S. Joshva and 5) J.B.Sivakumar only (In this list, the petitioner Shri Rajani Kanta Naik, Shri P.T.KalaiSelven and Shri R.Elango are excluded), since only these Directors are figuring in the IEC data base till now. If any Directors are nominated by creditor Bank, the Company has to make a request to this Office for deletion of name from Directorship in the IEC data base enclosing supportive documents for the same as per Policy Procedures. As long as any Director name is existing in the IEC data base, they are liable for the action with reference to the Recovery Order. Hence, the Creditor Banker has to take steps with the Company for such action.*

27. In light of the discussion as above, I find merit in the prayer of the petitioners and thus accept the same. These writ petitions are allowed and the impugned order is set aside. No costs. Connected miscellaneous petitions are closed.

06.12.2022

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Index : Yes
Speaking Order

Dr.ANITA SUMANTH,J.

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To

1.Deputy Director General of Foreign Trade,
Office of the Joint Director General of Foreign Trade,
1533, India Life Building (Annexe), I Floor,
Trichy Road, Coimbatore-641 018

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