

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8321 OF 2023

Smt. Supriya Chokhara

... Petitioner

vs.

The Union of India, through Central Govt. Advocates ... Respondents
and Ors.

Mr. Brijesh Pathak, for the Petitioner.

Mr. Jitendra Mishra with Mr. Ashutosh Mishra with Mr. Rupesh Dubey,
for Respondents.

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 5 April, 2024

Oral Judgment (Per G. S. Kulkarni, J.)

1. This petition under Article 226 of the Constitution assails a communication dated 25/30 July 2014 issued by respondent No.2 – Deputy Commissioner of Customs (Preventive), M&P Wing, Mumbai, to the Secretary, Pushpa Niketan Co-op. Housing Society (for short ‘**the Society**’) informing the society not to permit the petitioner to transfer the flat No.406-B owned by her without prior ‘No Objection’ (NOC) from the office of respondent No.2. The reason being that respondent No.2 had initiated certain investigation against the petitioner’s husband Shri. Anil B. Chokhara. It is also the case of the petitioner that a copy of the said communication was never

forwarded to the petitioner and that the petitioner came to know of the same recently from the society. Accordingly, the petitioner approached this Court in the present proceedings, praying for the following substantive reliefs:-

“(a) Issue appropriate writ or order in the nature of Qua Warranto thereby directing the 2nd Respondent to show cause under what authority could he have issued letter bearing F. No. II/MPIU-11/07-2014/3845 dated 25/30.07.2014, Exhibit-C;

(b) that this Hon'ble Court may be pleased to issue a Writ of Mandamus or a Writ in the nature of Certiorari or any other appropriate writ or order thereby declaring that the action of issuance of letter bearing F. No. II/MPIU-II/07-2014/3845 dated 25/30.07.2014, by the Respondent No.2 as illegal and the Respondent No.2 be directed to withdraw the aforesaid letter forthwith;”

2. Mr. Pathak, learned Counsel for the petitioner has contended that respondent No.2 has no authority in law and more particularly under the provisions of the Customs Act,1962, to issue the impugned communication in regard to the petitioner's premises merely for the reason that there was some investigation and enquiry against the petitioner's husband. He submits that the impugned communication is addressed on the basis of an alleged statement of the petitioner's husband, as recorded under Section 108 of the Customs Act. It is the petitioner's submission that even if it is the case of the department that the flat in question was purchased by the petitioner's husband in the petitioner's name (although it is not), respondent no.2 would not have jurisdiction in any manner to consider the same to be the property of the petitioner's husband and have an indirect attachment of the said property under the impugned communication. He would submit that the petitioner is

discharging loan installments in respect of the said flat from her income. It is his contention that such action on the part of respondent No.2 would also be hit by Section 3 of the Prohibition of Benami Property Transactions Act, 1988. He has supported such contention by placing reliance on the decision of the Division Bench of the Kerala High Court in the case **Dy. Commissioner of Cus. (Preventive), Kozhikode Vs. Ayesha. A. V.**¹

3. On the other hand, Mr. Mishra, learned Counsel for the respondents in support of the impugned communication, would submit that there were investigations against the petitioner's husband during the course of which, his statements were recorded under Section 108 of the Customs Act, wherein he had *inter alia* stated about the said flat being owned by the petitioner under a registered document.

4. It is submitted that as such information about the petitioner's flat was provided, the flat was required to be considered as the property belonging to her husband and hence, pending the investigation, there was nothing wrong / illegal for respondent No.2 to issue the impugned communication. Mr.Mishra has fairly stated that now the investigation stands concluded, also a show cause notice dated 9 February 2021 was issued to the petitioner's husband and the same has been adjudicated in terms of the order-in-original dated 29 February 2024.

¹ 2014(300) E.L.T167 (Ker.)

5. On the aforesaid rival contentions, two questions are raised for our consideration. Firstly, whether respondent No.2 would have any authority under the Customs Act to proceed against the property of a third party namely of the wife of a person Shri. Anil B. Chokhara who is being investigated; and secondly, whether *de hors* the Customs Act, there is any provision in law permitting respondent no.2 to issue such communication.

6. In our opinion, both the questions are required to be answered in the negative. We have not been pointed out any provision which can be resorted by the Customs officials to attach the property of a third party like the petitioner who cannot be connected to any recovery under the Customs Act, much less to issue the impugned communication. Even the provisions of Section 142 of the Customs Act which provides for recovery of sum due to Government could not have been resorted by respondent no.2 to issue the impugned communication. Thus, respondent No.2 has acted in patent lack of jurisdiction.

7. This apart, there is another aspect of the matter which, in our opinion, would go to the root of the matter. Even assuming that a statement is stated to be made by the petitioner's husband in relation to the flat in question being purchased by him or actually being his property and ostensibly owned by the petitioner, however, considering the clear provision of Section 3 of the

Prohibition of Benami Property Transactions Act, 1988, respondent No.2 cannot have any jurisdiction to question the petitioner's ownership of the flat. The only person who can question the petitioner's ownership, would be the husband of the petitioner. In this regard, the provisions of Section 3 of the Prohibition of Benami Property Transactions Act, 1988 are required to be noted, which read thus:-

"3. Prohibition of benami transactions-

- (1) No person shall enter into any benami transaction.
- (2) Whoever enters into any benami transaction shall be punishable with imprisonment for a term which may extend to three years or with fine or with both.
- (3) Whoever enters into any benami transaction on and after the date of commencement of the Benami Transactions (Prohibition) Amendment Act, 2016, shall, notwithstanding anything contained in sub-section (2), be punishable in accordance with the provisions contained in Chapter VII."

8. Thus, in issuing communication of the nature as impugned, the respondent had, in fact, taken upon himself an obligation of concluding that the flat belongs to the husband of the petitioner, when in law such declaration can only be granted by a Civil Court. For such reason, even otherwise, respondent No.2 would not have any jurisdiction to issue the impugned communication.

9. In such context, Mr. Pathak's reliance on the decision of the Division Bench of Kerala High Court in *Dy. Commissioner of Cus.(Preventive), Kozhikode Vs. Ayesha.A.V.* (supra) is quite apposite. The issue before the

Kerala High Court was in regard to the recovery of the dues of the defaulter, who was husband of the respondent therein. Whether the wife and children of the defaulter were entitled to be proceeded against and whether the properties standing in their name could be applied to the satisfaction of such dues of the defaulter on the premise that the same were in fact purchased by the defaulter and that the purchase was in favour of the defaulter's dependents. The Court considering the provisions of Section 142 of the Customs Act, 1962 as also the provisions of Section 3 of the Benami Act repelled the revenue's contention. It was observed that the Department may have power or authority to adjudicate on the legal rights of the husband-defaulter, however, it could not question the ownership of the wife, deeming it to be ostensible ownership, and considering the real ownership of the defaulter / husband. It was observed that there was total absence of any judicial or quasi judicial power with the Customs authority and same could be exercised only by the Courts. The relevant observations as made by the Court are required to be noted, which read thus:-

“11. In the instant case the Department claims that the property purchased in the name of the wife is that of the 'defaulter' and since sub-section (2) of Section 3 of the Benami Act saves purchases of property by a person in the name of his wife, hence the property is to be treated as one in the control of the husband: here 'the defaulter'. The fact that the Benami Act saves a purchase in favour of the wife by the husband, from the prohibition contained in the statute, does not at all aid the Department unless it is established that the transaction was not for the benefit of the wife. There cannot be any control conferred on the husband merely for reason of the purchase being made in the name of the wife; with the money of the husband. The further contention of the learned Standing Counsel is that the relationship between a husband and wife is fiduciary in character and that the husband having

paid the consideration for the purchase of the property, the wife is bound to account to the husband and in such circumstance the property even if in the name of the wife, can be proceeded against for the dues of the husband/defaulters. The learned counsel also relies on the Division Bench decision of this Court in *Sunitha v. Ramesh* [2010 (3) KLT 501] and the decision of the Supreme Court in *Marcel Martins* (supra) to advance the said proposition.

14. The principle stated in the said decision cannot clothe the Department with any power or authority or a legal right to step into the shoes of the husband/defaulters; as has been stated above. The transaction between the husband and wife cannot, going by the declaration of law in the decisions cited above, be ever termed as a benami transaction, since the Benami Act itself saves such transaction entered into for the benefit of the wife, even if the consideration is paid by the husband.

15. If any person is holding property other than the defaulter and on which property the defaulter is said to have an interest, then there should be a provision in the statute clothing the officer entrusted with the levy or collection, to so adjudicate on the Interest of the defaulter and come to a finding with respect to that. Of course then notice should also be served on all affected parties. We have already found that the contention with respect to the fiduciary relationship, benami transactions and sham transactions do not at all aid the Department unless they approach the proper forum for adjudication of such grounds, especially so when no officer authorized under the Act and the Rules are conferred with such adjudicatory powers. In the absence of any such judicial or quasi-judicial powers, conferred on the authorities, the same can only be exercised by the Courts on which the State has conferred, its judicial powers.”

10. In the light of the above observations, we are quite clear that respondent No.2 did not wield any authority to issue the impugned communication. It was issued in patent lack of jurisdiction. The petition, accordingly, needs to succeed. It is allowed in terms of prayer clause (a) which reads thus:-

“(a) Issue appropriate writ or order in the nature of Qua Warranto thereby directing the 2nd Respondent to show cause under what authority could he have issued letter bearing F. No.II/MPIU-II/ 07-2014/3845 DATED 25/30.07.2014, Exhibit-C:”

11. Although we have allowed the petition, all contentions of the parties *inter alia* to the proceedings under the Order-in-Original as passed by the Adjudicating Officer are expressly kept open.

12. Disposed of in the aforesaid terms. No costs.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKARNI , J.)