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W.P.No.10108 of 2022

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 02.04.2024

CORAM

THE HON'BLE MR.JUSTICE **G.K.ILANTHIRAIYAN.J**

W.P.No.10108 of 2022

and

WMP.Nos.9795, 9796 & 9797 of 2022

D.V.Rao

... Petitioner

Vs.

1. The Deputy Director General of Foreign Trade,
Office of the Zonal Additional Director General of Foreign Trade,
Ministry of Commerce and Industry (GOI),
Shastri Bhawvan, 4th Floor, Annexe,
No.26, Haddows Road, Chennai-600 006.
2. The Assistant Director General of Foreign Trade,
Office of the Zonal Additional Director General of Foreign Trade,
Ministry of Commerce and Industry (GOI),
Shastri Bhawan, 4th Floor, Annexe,
No.26, Haddows Road, Chennai-600 006. ... Respondents

Prayer : Writ Petition filed under Article 226 of the Constitution of India for issuance of a Writ of Certiorari to call for the entire records of the 2nd Respondent herein leading to the issuance of the impugned proceedings issued in F.No.04/95/R(297)/Addl.DGFT/ECA/CHE/AM22, dated 24.12.2021, by the 2nd respondent and quash the same insofar as the petitioner is concerned as illegal, arbitrary, unfair and without authority of law and without jurisdiction.



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For Petitioner : Mr.J.Subash

For Respondents : Mr.C.Kulanthaivel
Senior Panel Counsel

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ORDER

This writ petition has been filed challenging the order passed by the second respondent dated 24.12.2021 thereby ordered to remit the penalty amount and pay customs duty with interest within a period of three weeks.

2. The petitioner was a Director in M/s.KFPL Drum Private Limited for the period of 09.07.2010 to 01.09.2011 and thereafter the petitioner was tendered his resignation on 01.09.2011 and the same was accepted and thereafter submit Form 32 as per the Companies Act, 1956. Thereafter, the petitioner did not involved in the affairs of the company in any capacity after the date of his resignation. However, order dated 29.07.2020 issued by the Deputy Director General of Foreign Trade directed the petitioner to pay the penalty amount which was imposed on the company. If he not paid the penalty, penal action will be taken as against the petitioner as per Section 11(7) of the Foreign Trade



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(Development and Regulation) Act, 1992. The allegation as against the

company is that non-fulfillment of export obligations incurred under the Export Promotion of Capital Goods Scheme (EPCG) License/Authorization No.0430009278 dated 13.12.2010 which was due to be fulfilled within a period of eight years from the date of issuance of license. As per the order in Original the condition on the company under the scheme was to fulfill 50% export obligation in the first block within six years from the date of issue of license and the balance 50% in the next two years. The order in original is during the time which the non-fulfillment of export obligations and consequent liabilities of the company under the EPCG Scheme arose was in the years 2016 and 2018. Therefore, it was happened after period of five years from the date of his resignation and from his Directorship of the company. That apart, no specific allegation as against the petitioner is that the petitioner was also involved in the day today affairs of the company during his period. However, the first respondent has imposed penalty under the Foreign Trade (Development & Regulations) Act, 1992. Therefore, the impugned order is issued as against the petitioner who had already resigned from



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the company. Further, the show cause notice dated 20.02.2020 was

issued only to the company and the copies were marked to the Directors.

Despite the fact that the petitioner was no longer represented the company and have not been a director of the company for the past several years. The petitioner is not liable to pay any penalty.

3. On perusal of the counter affidavit filed by the respondents revealed that M/s.KFPL Drums Private Limited (IEC:0410027618) had been granted an EPCG License/Authorization No.04300009278 dated 13.12.2010 for a total duty saved value of Rs.41,11,341/- under 3% concessional duty EPCG Scheme for import of capital goods listed with the said license/Authorization, with an obligation to export "M.S.Drums & Barrels" manufactured out of the imported capital goods to the tune of total f.o.b. value of US \$ 712,691.83 i.e., 8 times of the Duty Saved Value equivalent to free foreign currency over and above the annual average of the past export performance fixed as "nil" within a period of 8 years from the date of its issue, subject to the condition that 50% export obligation should be met in the first block within six years from the date of issue of



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license/authorization and balance 50% export obligation in the next two years.

3.1. For the purpose of discharge of said export obligation, M/s.KFPL Drums Private Limited, Chennai were required to submit the export documents under ANF-5B, as per Para-5 13 of Hand Book of Procedures, 2009-14 as amended, within a period of three months from the date of expiry of above block periods. Further, the firm was obligated to submit a report on fulfillment of export obligation by 30th April of every year to the Licensing Authority/Regional Authority concerned, as per Para.5.6 of Hand Book of Procedures, 2009-14 as amended. The firm was also required to submit the Installation Certificate issued by the Central Excise Authority or Chartered Engineer as the case may be, within a period of six months from the date of import to the Regional Authority/Licensing Authority concerned, as per Para.5.3.1 of Hand Book of Procedures, 2009-14 as amended.



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3.2. M/s.KFPL Drums Private Limited, Chennai had not submitted the export documents under ANF-5B or year-wise progressive Report and Installation Certificate as required, office had issued cautionary letter No.04/21/021/00882/AM11 dated 15.04.2019. Since no reply was received, a Show Cause Notice No.042102100882 (IEC:0410027618) dated 20.02.2020 was issued to M/s.KFPL Drums Private Limited, Chennai within a copy marked to the Branch/Factory address and Directors providing the firm and its representatives an opportunity to avail a personal hearing on 28.02.2020, to explain the reasons and facts within a period of 15 days, as to why action should not be taken for placing the firm under Denied Entity List, refusing issuance of further licenses/authorizations/renewal of old licenses/authorizations and other export benefits etc., in terms of Section 9(2) of Foreign Trade (Development & Regulation) Act, 1992 read with Rule-7(k) of Foreign Trade (Regulation) Rules, 1993 and as to why penalty should not be imposed adjudicating their case under section 11(2) of Foreign Trade (Development & Regulations) Act, 1992, in exercise of the powers under Section-13 of the Foreign Trade (Development & Regulation) Act, 1992.



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3.3. The Show cause notice addressed to the registered office of M/s.KFPL Drums Private Limited, Chennai and copies of show cause notice endorsed to one of the Directors viz., Shri.Madan Mohan K and to the branch address at Kasimitta Village, Narayanavanam, Mandal, Near Puttur, Chittor District, Andhra Pradesh, Pin-517581 as per details available in the IEC data base of M/s.KFPL Drums Private Limited, chennai had been returned undelivered by the Postal Authorities concerned with the remarks "Left/Addressee left without instructions/Return to sender," while the other copy addressed to one of the Directors Shri.D.V.Rao had been delivered.

4. However, the petitioner did not inform the respondents with regards to his resignation from the post of Director nor updated the Imported Exporter Code (IEC) database in the DGFT website. The learned counsel for the petitioner relied upon the judgment of the Hon'ble High Court of Delhi in which similar matter was dealt with and held in the case of *Anita Grover vs Commissioner of Central Excise* reported in **2013 (288) E.L.T. 63 (Del)**. The relevant portion of the order is extracted



hereunder :

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....."6. The above provisions make it clear beyond doubt that it is only the defaulter against whom steps may be taken under Rules. The defaulter is the person from whom dues are recoverable under the Act, which in the present case undoubtedly is the company. There is no averment that the company has been or is being wound up. in that case, there cannot be any question about the separate juristic personality of an existing company and its former director; the dues recoverable from the former cannot, in the absence of a statutory provision, be recovered from the latter. There is no provision in the Customs Act, 1962 corresponding to Section 179 of the Income Tax Act, 1961 or Section 18 of the Central Sales Tax, 1956 which enable the revenue authorities to proceed against directors of companies or such like third parties who are not defaulters.

7. In *Union of India v. MD. Lofikar* (1988) 172 ITR 1 (Bom), the Bombay High Court held that the directors of any company, whether public limited or private, are not personally liable for the debts of the company unless the Company Court finds them guilty of any mis-feasance or wrongs. In *G C. Malhotra v. Deputy Collector*-(1998) 110 STC 406 (All). the Court held that in case of a private company, recovery of tax dues from it cannot be made from its directors, unless permitted by specific provisions of the law or by an agreement between the parties. In *Mukesh Gupta v. State of Haryana*-(1996) & PHT 326 (P&H), the Punjab and Haryana High Court examined and held that a director was not liable personally for the amount due towards arrears of sales tax from the company. This view was reiterated by this Court in *Suneet Khurana v. Assistant Collector*-(1997) 10 PHT 495 (P&H).

8. In *Om Prakash Waleche v. State of Haryana*, 2009 (238) ELT. 215 (PBH) the Punjab and Haryana High Court upheld the assessee's contention that no recovery either of Haryana General Sales Tax or Central Sales Tax could be effected personally from the Director in respect of the liability of the Company, Again, this view was followed



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in *A.P. Raheja and Another v. State of Haryana and Others* (2010) 29 VST 103 (P&H). To end the discussion, the decision of the Kerala High Court, in *Nishad Patel & Anr. v. State of Kerala & Ors* (1999) 96 Comp Case 861 (Ker.) requires to be noticed. In that case, it was held that :

"In the present case what respondents Nos 3 to 5 seek to recover is arrears of sales tax allegedly due from Alliance Leathers (P) Ltd. The petitioners are only the directors of the said company as already noted. They have in their possession no assets of the company whatsoever. As such, they have no personal liability in respect of the dues allegedly due from the company it is by now well-settled that a director of a company cannot be proceeded against for recovery of arrears of any amount due from the company as already noticed Therefore the present proceedings ritard apanst the petitioners for recovery of sales tax arrears allegedly due from the company is totally without jurisdiction Moreover, the present proceedings of respondents Nos 3 to 5 are volative of the principles of natural justice and the tundamental nights of the petitioners guaranteed under articles 14 and 21 of the Constitution of India. No notice whatsoever has been issued to the petitioners before coercive action was initiated which will result in arrest and detenton of the petitioners under Section 23(2)(b) of the Kerala General Sales Tax Act, 1963. As such, the said action of respondents fos 3 to 5 are totally unsustainable"

9. The Court is of opinion that the impugned notices and action of the Customs authorities is at once in utter violation of Article 265 of the Constitution, as it seeks to recover tax dues of one from another, without authority of law also amounts to illegal deprivation of the petitioner's property, without authority of law, under Article 300-A of the Constitution of India"



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Hon'ble High Court of Delhi in which similar matter was dealt with and held in another case of ***Ved Kapoor vs Union of India*** reported in **2014 (299) E.L.T. 385 (Del)**. The relevant portion of the order is extracted hereunder :

....."6. A perusal of the adjudication order dated 31.05.2010 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 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 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 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 Toistoy 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.

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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 Division Bench judgment of Punjab & Haryana High Court in A.P. Raheja and Arr. v. 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 v. Assistant Collector Grade-I and Ors, WP (C) No. 10676 of 2009, decided on 4-8-2009, 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 v. Commissioner of Central Excise and Ors.196 (2013) DLT 596-2013 (288) [E.L.T.](#) 63 (Def). 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 license is issued to a company and there is a default in carrying out the export obligation attached to the license, 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 license. 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 able to discharge the liabilities of the company. However, in certain cases, the Courts can sit 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 v. Union of India-1908 (20) ELT. 264 (Del.), the petitioners were served with notice under Section 11A of Central Excises 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 misstatement 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 manufacturer 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 veill 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 misstatement or suppression of facts, or contravention of the provisions of the Act and the Rules made thereunder. 50 far as Individual liability of o 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 v. Director General of Foreign Trade-2006 (88) DRJ 680, a company had obtained EPCG license 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-fulfillment 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 Section 11(2) of the Act, if they are of the opinion that he was under a duty or obligation to fulfill the export obligation of the company and consciously failed to do so. Of course, in such 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"



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5. Thus it is clear that the Directors of the company cannot be substituted of the company in their individual capacity. There is no provision of the Act for recovery of the penalty imposed from its Directors even the said penalty cannot be recovered from the company. Therefore, penalty imposed against the petitioner cannot be enforced as against the petitioner. That apart, the petitioner had already resigned from his Directorship as early as on 01.09.2011 and the same was also accepted and Form 32 was also filled and filed with the Registrar of Companies in accordance with the provisions of the Companies Act, 1956.

6. In view of the above, the impugned order passed by the 2nd respondent dated 24.12.2021 cannot be sustained and liable to be quashed. The respondents are directed to implement the order dated 24.12.2021 as against others except this petitioner in the manner known to law.



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7. With the above direction, this writ petition is allowed.

Consequently connected miscellaneous petitions are closed. No costs.

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Index : Yes/No

Speaking/Non-speaking Order

Neutral Citation : Yes/No

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To

1. The Deputy Director General of Foreign Trade,
Office of the Zonal Additional Director General of Foreign Trade,
Ministry of Commerce and Industry (GOI),
Shastri Bhawan, 4th Floor, Annexe,
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