

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 3032 of 2022

=====

NEHAL ASHWINKUMAR SHAH
Versus
STATE OF GUJARAT

=====

Appearance:

MR HIREN J TRIVEDI(8808) for the Petitioner(s) No. 1
MR UTKARSH SHARMA, AGP - ADVANCE COPY SERVED TO
GOVERNMENT PLEADER/PP for the Respondent(s) No. 1
DS AFF.NOT FILED (N) for the Respondent(s) No. 1,2

=====

CORAM:**HONOURABLE MR. JUSTICE J.B.PARDIWALA**
and
HONOURABLE MS. JUSTICE NISHA M. THAKORE

Date : 23/02/2022

ORAL ORDER

(PER : HONOURABLE MR. JUSTICE J.B.PARDIWALA)

1 By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

“(A) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions to the respondent authorities to immediately lift the attachment on Bank Accounts being current A/c bearing no.066005001010670 maintained with AMCO Bank, Girdhar Nagar Branch, Ahmedabad.

(B) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions to quash and set aside the impugned notice / communication dated 07.12.2021 (at Annexure – B) and further be pleased to declare that the petitioner is not liable for the dues of M/s. Neha Exim Private Limited;

(C) Your Lordships may be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or directions to restrain the respondent – authorities to initiate any others

recovery actions against the petitioner for alleged dues of M/s. Neha Exim Private Limited;

(D) During the pendency and final disposal of the present petition, Your Lordships may be pleased to direct the respondent authorities to restrain from taking any coercive steps and not to recover any amount from Bank Accounts being current a/c bearing no.066005001010670 maintained with AMCO Bank, Girdhar Nagar Branch, Ahmedabad and further be pleased to lift the attachments on aforementioned accounts;

(E) Pass any such other and/or further orders that may be thought just and proper, in the facts and circumstances of the present case;”

2 We need not delve much into the facts of this case as the issue raised in the present litigation is no longer *res integra*.

3 It appears from the materials on record that the writ applicant is a Director of a company namely M/s. Neha Exim Energy Private Limited (for short, “the company”). The company does not appear to be operational. To put it in other words, no commercial activities are being undertaken past many years. The company has been registered under the VAT Act. The company was assessed under Section 34 of the Act, 2003 for the period 2008-09 and a demand was raised in the hands of the company. The company is the taxable entity for the purpose of the Act, 2003.

4 It further appears that the assessment order was challenged by filing an appeal, but such challenge failed.

5 The writ applicant is here before this Court because his personal bank account maintained with the AMCO Bank, Girdharnagar Branch, Ahmedabad has been freezed pursuant to a letter addressed by the department to the Branch Manager. The department thought fit to initiate the above action on the premise that the department has to

recover Rs.1,58,65,840/- from the company.

6 We have heard Mr. Hiren Trivedi, the learned counsel appearing for the writ applicant and Mr. Utkarsh Sharma, the learned A.G.P. appearing for the State.

7 The principal argument of Mr. Trivedi is that for the purpose of recovering the dues of the company, the department could not have proceeded to attach a personal bank account of its Director. He would submit that it is the company who could be termed as the taxable entity for the purpose of the VAT Act, 2003.

8 Mr. Sharma, the learned A.G.P. appearing for the State, with his usual fairness, submits that the issue is no longer *res integra* in view of two orders passed by this Court in the case of : (i) **Paras Shantilal Savla vs. State of Gujarat** [Special Civil Application No.7801 of 2019 decided on 27th June 2019] and (ii) **Sunita Ramesh Bansal vs. Assistant Commissioner of State Tax** [Special Civil Application No.229 of 2022 decided on 13th January 2022]. We quote the relevant observations made by this Court as contained in para 6 of the order passed in the case of **Paras Shantilal Savla (supra)** as under:

“6. We may quote the relevant observations rendered in Special Civil Application Nos. 243, 3103 and 7578 of 1991 decided on June 17, 2004. The judgment reads thus:

“1. Special Civil Application No.243 of 1991 challenges the constitutional validity of sub-section (4A) of Section 47 of the Gujarat Sales-tax Act, 1969 on the ground that the said provisions are violative of Articles 14, 19(1)(g) and 300A of the Constitution of India. The said petition also challenges the order dated 5.8.1989 passed by the Assistant Sales-tax Commissioner (Appeals), Baroda on the basis of which the Deputy Collector, Revenue Recovery, Bombay had initiated the proceedings for

recovery of arrears of sales-tax dues of M/s. Choksi Plastics Pvt. Ltd. from the present petitioners who are the Directors of the said Company. The said proceedings are challenged on the ground that the Company and its Directors being separate legal entities, the liability of the Company to pay sales-tax cannot be fastened on the Directors personally or on the personal properties of the Directors, in absence of any provision to that effect under the Gujarat Sales-tax Act, 1969. Consequential reliefs are also prayed for in the petition.

2. Special Civil Application No.3103 of 1991 also challenges the constitutional validity of the provisions of sub-section (4A) of Section 47 of the Gujarat Sales-tax Act, 1969 (for brevity, "the Act") and consequential reliefs are prayed for.

3. Special Civil Application No.7578 of 1991 is filed by the two Directors of the Kutch Agro Industries Pvt. Ltd. and similar proceedings initiated by the Salestax Officer, Bhuj and the Recovery Officer, respondents No.1 and 3 herein, for recovery of salestax dues of the said Company from the petitioners. In this petition also the proceedings are challenged on the same ground as in Special Civil Application No.243 of 1991.

4. Since these petitions raise common question about constitutional validity of sub-section (4A) of Section 47 and/or about personal liability of Directors for the sales-tax dues of their respective Companies, we have heard Mr Hasurkar and Mr YS Mankad learned counsel for the petitioners and also heard Mr Gori, learned AGP for the respondent-authorities.

5. At the relevant time, sub-section (4A) of Section 47 of the Act as under:-

“(4-A) If a dealer does not pay any amount of tax within the time prescribed for its payment under subsection (1), (2) or (3) or on or before the date specified in a notice issued under sub-section (4) in respect of the amount of tax falling under sub-clause (ii) of clause (a) thereof, there shall be paid by such dealer for the period commencing on the date of expiry of the aforesaid prescribed time or the specified date and ending on the date of payment of the amount of tax, simple interest at the rate of twenty four per cent per annum on the amount of tax not so paid or on any less amount thereof remaining unpaid during such period;

Provided that where a penalty is levied under subsection (6) of section 45 in respect of the difference and the period referred to in that sub-section, no interest shall be payable under this sub-

section on such difference for such period.”

However, by Amendment Act No. Guj.20 of 2001, S.6, the rate of interest is reduced from 24 per cent to 18 per cent w.e.f. 1.9.2001.

6. As regards challenge to the constitutional validity of sub-section (4A) of Section 47 of the Act, our attention is invited to the decision of another Division Bench of this Court in Ashapura Mineral Company vs. State of Gujarat & Ors., (1993) 89 STC 289 wherein the same challenge was raised before this Court. After examining the provisions under challenge and the relevant authorities and after examining various submissions, this Court turned down the challenge and held as under:-

“Section 47(4-A) of the Gujarat Sales Tax Act, 1969, which provides for payment of interest at the rate of 24 per cent per annum on amounts of tax not paid within the prescribed time or within the time specified in notices issued under Section 47(4) or on any amounts remaining unpaid, is a provision for payment of interest by a dealer who does not pay tax within the time prescribed for its payment, or on or before the date specified in the notice issued under sub-section (4). The liability to pay interest arises when tax becomes due, either as a result of furnishing of declaration or return by the dealer or on assessment or reassessment as the case may be. Interest is made payable on that amount of tax which ought to have been paid earlier, i.e. within the prescribed time or the specified period and which has not been paid. Interest is made payable because Government to that extent is deprived of the use of money which otherwise it could have got at an earlier point of time. The liability arising under section 47(4-A) is absolute in nature. The rate of interest payable is fixed by the Legislature itself and no discretion in that behalf is left with the sales tax authorities. Once it is found that the dealer has not paid tax within the prescribed time the liability to pay interest arises under the Act and it is not open to the sales tax authorities to waive it for any reason. Separate provision has been made by the Legislature for levy of penalty. The rate of interest under section 47(4-A) is also not so high as to render it penal in nature. Considering the purpose for which the withheld amount can be utilised by the State Government, the prevailing rate of interest in the market, the rate of 24 per cent per annum cannot be regarded as too high to retain its compensatory character. Section 47(4-A) is in reality and substance not a provision for imposition of levy of penalty and, therefore, it was not necessary for the Legislature to lay down guidelines and to provide for an inquiry.

Provision for payment of interest being a method of collecting or recovering revenue, it is for the State to decide what is most efficacious for this purpose, and the defaulter has no moral right to make any grievance in this behalf. If the rate of interest fixed for non-payment of tax within time is not unreasonably high, then it cannot be said to be arbitrary or unreasonable.”

The Court also considered the contention that the State which had to refund the amount of excess tax paid either voluntarily by the dealer or as a result of an assessment order had to pay lower rate of interest under Section 54 of the Act. The Court negated the contention about discriminatory treatment and held that the dues of the Government of a State being the dues of the entire people of the State, there is a valid basis for differentiation between dues of the Government of a State and dues of an individual. Whereas the State Government utilises its funds for public welfare, an individual ordinarily uses money for his private purposes. Hence, the Legislature was justified in treating the State Government as a separate class and providing for a higher rate of interest on the dues of the Government of the State.

7. In view of the aforesaid pronouncement of this Court, the prayers challenging the constitutional validity of the provisions of sub-section (4A) of Section 47 of the Gujarat Sales-tax Act, 1969 are hereby rejected.

8. Coming to the second controversy involved in Special Civil Application No.243 of 1991 and also in Special Civil Application No.7578 of 1991, Mr Hasurkar and Mr Mankad, learned counsel for the petitioners have submitted that since the Company and its Directors are separate legal entities, the liability of the Company to pay sales-tax on sale of goods effected by the Company cannot be fastened on the Directors personally or on the personal properties of the Directors. Referring to the provisions of Section 26, it is submitted that there are special provisions regarding liability to pay tax in certain cases like on the death of the dealer, partition of a Hindu undivided family, dissolution of a firm and transfer of business, termination of the guardianship or termination of the trust, but there is no provision fastening liability of a private Company on its Directors.

Reliance is placed on the decisions in Desirajur Vennkatakrishna Sarma, In re, (1955) 25 Company Cases 32, Kundan Singh vs. Moga Transport Co.(P.) Ltd. & Ors., (1987) 62 Comp. Cases 600 and in Tikam Chand Jain vs. State Government of Haryana & Anr., (1987) 62 Comp. Cases 601.

9. On the other hand, Mr Gori, learned AGP for the respondents has vehemently submitted that since the arrears of sales-tax could not be recovered from the respective Companies, the respondent-authorities are justified in taking recourse to the properties of the Directors. Mr Gori has referred to the provisions of Section 78 of the Gujarat Sales-tax Act and has submitted that the analogy is required to be drawn from the said provisions which lay down that where an offence has been committed by a Company, every person who at the time the offence was committed was in charge of, and was responsible to the Company for the conduct of the business of the Company as well as Company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. In the alternative, Mr Gori has submitted that even if the Company and its Directors are separate legal entities, it is open to the authorities to lift the corporate veil and to proceed against the personal properties of the Company.

10. Before dealing with the rival submissions, we would like to point out that in neither of the two petitions i.e. Special Civil Application No.243 of 1991 and 7578 of 1991, the authorities have passed any specific order fastening the liability on the Directors for payment of sales-tax dues of the respective Companies. For instance, in the letter dated 31.8.1989, the Assistant Sales-tax Commissioner (Appeals) Baroda has informed the concerned Salestax Officer at Godhra that the appeal filed by Choksi Plastics Pvt. Ltd. was being dismissed on account of non-compliance with the order for deposit of the sales-tax dues of the said Company, but it appeared that the financial position of the Directors of the said Company was good and it was possible to recover the dues from the said Directors. Hence, appropriate action may be taken for recovery of sales-tax dues of the said Company in accordance with law. It appears that it is on the basis of the aforesaid communication that the Sales-tax Officer, Godhra and the Recovery Officer proceeded against the personal properties of the Directors of Choksi Plastic Pvt. Ltd.. Similarly, in Special Civil Application No. 7578 of 1991 nothing is brought to our notice to indicate that the concerned authority had taken any conscious decision to fasten the Company's liability on the Directors of the Company personally or on their properties.

11. In view of the above factual position, it is not necessary to examine the controversy at length. Suffice it to state that the respondents are not in a position to point out any statutory provision empowering the sales-tax authorities to fasten the liability of Company on its Directors in the matter of payment of sales-tax dues. There appears to be substance in the submission

made on behalf of the petitioners that Section 26 containing the said provision regarding liability to pay tax in certain cases covers several contingencies such as the liability in respect of the business carried on by an individual dealer after his death, the liability in respect of the dues where the dealer was an HUF and there is partition amongst various members or group of members; there is dissolution of a partnership firm and also in case of transfer of business in whole or in part. Unlike Section 179 of the Income-tax Act, 1961, there is no provision in the Sales-tax Act fastening the liability of the Company to pay its sales-tax dues on its Directors.

12. Reliance placed by the learned AGP on the provisions of Section 78 is misconceived. The section specifically deals with offences by companies and the criminal liability is fastened on the Directors who were in charge of and were responsible for the conduct of the business of the Company, but does not at all provide for any personal liability of the Directors to pay the sales-tax dues of the Company nor does it empower the authorities to proceed against the personal properties of the Directors. The very fact that the same Legislature has in the same Act provided for criminal liability of the Directors without providing for any personal liability of the Directors or their personal properties for payment of sales-tax dues of the Company in question, the provisions of Section 78 lend support to the case of the petitioners rather than the case of the authorities.

13. As regards the faint plea of lifting the corporate veil, as per the settled legal position, the corporate veil is not to be lifted lightly. It is only when there is strong factual foundation for lifting the corporate veil that the question of examining the applicability of the principle of lifting such veil would be required to be examined. In neither of the two petitions raising the controversy, the authorities have passed any specific order fastening the liability on the Directors personally, much less any factual foundation has been laid to invoke the doctrine of lifting the corporate veil. Hence it is not necessary to dilate on the said principle any further.

14. In view of the above discussion, Special Civil Application No.3103 of 1991 is rejected since the constitutional validity of sub-section (4A) of Section 47 of the Gujarat Sales-tax Act, 1969 is already upheld in the case of Ashapura Mineral Company vs. State of Gujarat & Ors., (1993) 89 STC 289. Rule is discharged. Similar prayer made in Special Civil Application No.243 of 1991 is also rejected.

15. However, Special Civil Application No.243 of 1991 and 7578 of 1991 are allowed to the extent that the respondents are restrained from proceeding against the petitioners or their personal properties for recovery of the sales-tax dues of the respective Companies in which they are Directors. Rule is made absolute to the aforesaid extent only in the said two petitions. There shall be no order as to costs.”

9 Thus, unlike Section 179 of the Income Tax Act, 1961, there is no provision in the Sales Tax Act fastening the liability of the company to pay its sales tax dues on its Director.

10 In the result, this writ application succeeds and is hereby allowed. The attachment on the bank account of the writ applicant is hereby ordered to be lifted. The bank shall permit the writ applicant to operate the bank account. It is needless to clarify that the dues which are payable by the company shall remain pending and it shall be open for the department to take appropriate steps against the company in accordance with law for the purpose of recovering its dues.

(J. B. PARDIWALA, J)

सत्यमेव जयते
THE HIGH COURT
OF GUJARAT

(NISHA M. THAKORE, J)

CHANDRESH

WEB COPY