

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 3098 OF 2024

Prasanna Karunakar Shetty, an Indian
Inhabitant, having his residence at
Flat No.18, 6th Floor, Trimurti
Residency, Plot No.16, J.B.Nagar,
Andheri (E), Mumbai 400 059.

... Petitioner

Versus

1. State of Maharashtra,
through the Government Pleader
High Court, Mumbai

2. Commissioner of State Tax,
having his office at 8th Floor,
GST Bhavan, Mazgaon, Mumbai

3. State Tax Officer,
Mum-BCP-C-005 (Kurla_701),
Nodal Division-11, Cabin No.E-2,
E-Wing, New Building, 2nd Floor,
GST Bhavan, Mazgaon, Mumbai

... Respondents

Mr.Arun Jain i/b Mr.Kartik Vig for the Petitioner
Ms.Shruti D. Vyas, Addl.G.P. a/w Ms.P.N.Diwan, A.G.P. for the State

CORAM: G. S. KULKARNI &
FIRDOSH P. POONIWALLA, JJ.
DATED: 16th April, 2024

ORAL JUDGEMENT (PER G.S.KULKARNI, J.) :

1. Rule. Rule made returnable forthwith.
2. Heard finally by consent of the parties.

3. This petition, under Article 226 of the Constitution of India, has prayed for the following reliefs:

“(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner's case and after going into the validity and legality thereof to quash and set aside the (I) Order of Attachment No. STO/ MUM-BCP-C-005(Kurla_701)/Recovery/ Attachment/2018-19/2023-24/B-323 dated 11.01.2024 [Exhibit "A"] issued by the Respondent No. 3; and (ii) Notice given by the Respondent No. 3 to IndusInd Bank, Chakala Branch, Andheri (E), Mumbai, for attaching the Current Account No. 201000639140 of M/s. India Hair of which the Petitioner is Proprietor;

(b) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No. 3 by himself, his subordinates, servants and agents to forthwith:

(i) withdraw/cancel the Order of Attachment No. STO/MUM-BCP-C-005(Kurla_701)/Recovery/Attachment/2018-19/2023-24/B-323 dated 11.01.2024 [Exhibit "A"] issued by the Respondent No. 3;

(ii) Lift the attachment from Flat No. 18, 6th Floor, Trimurti Residency, Plot No. 16, J.B. Nagar, Andheri (E), Mumbai 400 059, owned by and in possession of the Petitioner;

(iii) Revoke the Notice give to IndusInd Bank, Chakala Branch, Andheri (E), Mumbai, for attaching the Current Account No. 201000639140 of M/s. India Hair of which the Petitioner is proprietor;

(c) that pending the hearing and final disposal of this Petition, this Hon'ble Court be pleased to, by an interim order and injunction:

(i) stay the operation of the Order of Attachment No. 005(Kurla_701)/ STO/MUM-BCP-C-005(Kurla_701)/Recovery/Attachment/2018-19/2023- 24/B-323 dated 11.01.2024 [Exhibit "A"] issued by the Respondent No. 3 and direct the Respondents not to take any steps for implementation of the same;

(ii) refrain the Respondents from withdrawing any money from the Current Account No. 201000639140 of M/s. India Hair, of which the Petitioner is Proprietor, in IndusInd Bank, Chakala Branch, Andheri (E), Mumbai;

(d) for ad-interim relief in terms of prayer (c) above;

(e) for costs of this Petition;

(f) for such other and further order or orders as may be deemed just and proper in the facts and circumstance of the present case.”

4. The facts in brief can be noted as under:

5. The petitioner joined Universeus Impex Pvt. Ltd. as a Director on 2nd March 2017. Mr.Mayur Guliyana was another Director in the said company. In November 2017, the DIN of the petitioner got disqualified under Section 164(2)(a) of the Companies Act, 2013 (“Companies Act”).

6. It is the case of the petitioner that, thereafter, the petitioner did not participate in the affairs of the said company. He was a director in the said company only for some period. In March 2018, as there was vacancy in the Board of Directors due to the petitioner's DIN being disqualified, the petitioner informed the Board to look for an alternate director.

7. In pursuance thereof, on 1st June 2018, Mr. Vishal Tanna was appointed as a new director to replace the petitioner. Although, all this happened, the formal submission of the resignation of the petitioner had remained. In these circumstances, on 15th May 2019, the petitioner formally resigned as a director of the company.

8. The case of the petitioner is that, on 25th May 2019, the petitioner ceased to be a Director of the company. It appears from what has been stated by the petitioner that, on 7th August 2020, show cause notice came to be issued against the company demanding Goods and Service Tax (GST) of Rs.2,17,28,084/- along with interest of Rs.1,19,31,274/- and a penalty of Rs.2,17,28,084/-. On such show cause notice an order came to be passed on 27th November 2020 and a total demand of Rs.5,53,87,442/- came to be confirmed.

9. It has been contended by the petitioner that recovery against the Company and its Directors could not be taken forward. It is on such backdrop the petitioner sometime in November 2022, received a summons from the Andheri Police Station that a First Information Report (FIR) had been lodged against the petitioner by the Maharashtra State GST Department. On 14th December 2022, the petitioner applied for an Anticipatory Bail and was granted such bail by the Sessions Court, Greater Mumbai in connection with the said FIR.

10. After almost 8 months, the petitioner, on 7th July 2023, received a communication from the Asst. Commissioner of State Tax in regard to the recovery proceedings initiated against the Company, pursuant to the order dated 27th November 2020. On 18th December 2023, almost after a year of the petitioner being granted Anticipatory Bail, the petitioner received an email from his Bank that the Current Account of M/s.India Hair, of which the petitioner was a proprietor, had been attached as per the instructions of respondent no.3. Thereafter, on 11th January 2024, the impugned attachment of the petitioner's flat, being Flat No.18, 6th Floor, Trimurti Residency, Plot No.16, J.B.Nagar, Andheri (E), Mumbai 400 059, owned by and in possession of the petitioner, came to be received by the petitioner. The petitioner immediately thereafter submitted a representation dated 19th February, 2024 . On such backdrop, the petitioner has moved this petition.

11. The primary contention as urged on behalf of the petitioner is that the impugned order is in the teeth of section 79, read with section 89, of the Maharashtra Goods and Service Tax Act, 2017 ("MGST Act"). It is submitted that no show cause notice was issued to the petitioner. Also, as the petitioner had ceased to be a director of the company, there was no question of passing the attachment order in respect of the petitioner's immovable property and the current account. It is submitted that, merely because recovery is not possible against the company, the same would not empower the respondents to proceed against a former director, who was never involved in the day-to-day business operations and affairs of the company, nor had participated in the management of the company at the relevant time. It is submitted that such action of the respondent would be clearly contrary to and inconsistent with the provisions of section 79, read with section 89, of the Act.

12. On the other hand, relying on the reply affidavit placed on record, Ms.Vyas, the learned counsel for the Respondents would support the

impugned Attachment Order. It is her case that, as the petitioner was the director for some time, it was hence justified for the department to proceed against the petitioner by issuing the impugned attachment orders. She would submit that the petition accordingly be rejected.

13. There is a rejoinder affidavit placed on record contesting the contention as raised on behalf of the respondents in reply affidavit. It is on such backdrop, we have heard the learned counsel for the parties.

14. At the outset, we may observe that recovery sought to be made under the impugned order dated 27th November 2020 is for the period 1st April 2018 to 31st March 2019.

15. It appears that the petitioner had made out a case before the department that, in November 2017, the petitioner's DIN, as filed with the Registrar of Companies, was disqualified under the provisions of Section 164 (2)(a) of the Companies Act. It is also the case of the petitioner that from March 2018, the petitioner had not taken any active part in the day to day affairs of the company. It is also the petitioner's case that a new director was appointed on 1st June 2018 which is also the date falling under the relevant period. It is thus the petitioner's case that, for the period in question, the petitioner never acted as a director of the company.

16. We find much substance in the contention of the petitioner. All these factual issues were required to be verified before the impugned attachment orders were passed by the designated officer, by issuing a show cause notice to the petitioner calling upon him to show cause on tangible materials that the amount due and payable by the company was liable to be recovered from the petitioner under section 79, read with section 89, of the MGST Act. No such exercise was undertaken. Petitioner was neither issued a show cause notice nor was he heard, before such orders were passed.

17. We find much substance in the contention of the petitioner that such orders directly affect the petitioner's right to property guaranteed under Article 14 and 300A of the Constitution.

18. Certainly, the petitioner is an individual. His case is that for the relevant period he has not acted as a director of the company. The same ought to have basic consideration when Section 79 of the MGST Act was invoked for recovery against the petitioner. Also, Section 89 of the MGST Act provides for liability of the directors of the private limited company. Such provisions are required to be noted which reads thus:

“Section 79-Recovery of Tax

(1) Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:—

(a) the proper officer may deduct or may require any other specified officer 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 specified officer;

(b) the proper officer may recover or may require any other specified officer to recover the amount so payable by detaining and selling any goods belonging to such person which are under the control of the proper officer or such other specified officer;

(c) (i) the proper officer may, by a notice in writing, require any other person from whom money is due 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 Government either forthwith upon the money becoming due or being held, 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 sub-clause (i) 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 payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in case the person to whom a notice under sub-clause (i) has been issued, fails to make the payment in pursuance thereof to the Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow;

(iv) the officer issuing a notice under sub-clause (i) may, at any time, amend or revoke such notice or extend the time for making any payment in pursuance of the notice;

(v) any person making any payment in compliance with a notice issued under sub-clause (i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt;

(vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (i) shall be personally liable to the Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less;

(vii) where a person on whom a notice is served under sub-clause (i) proves to the satisfaction of

the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the Government any such money or part thereof;

(d) the proper officer may, in accordance with the rules to be 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 amount, if any, to such person;

(e) the proper officer 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 or to any officer authorised by the Government and the said Collector or the said officer, 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;

(f) Notwithstanding anything contained in the Code of Criminal Procedure, 1973, the proper officer may file an application to the appropriate Magistrate and such Magistrate shall proceed to recover from such person the amount specified thereunder as if it were a fine imposed by him.

(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.

(3) Where any amount of tax, interest or penalty is payable by a person to the Government under any of the provisions of this Act or the rules made thereunder and which remains unpaid, the proper officer of State tax or Union territory tax, during the course of recovery of said tax arrears, may recover the amount from the said person as if it were an arrear of State tax or Union territory tax and credit the amount so recovered to the account of the Government.

(4) Where the amount recovered under sub-section (3) is less than the amount due to the Central Government and State Government, the amount to be credited to the account of the respective Governments shall be in proportion to the amount due to each such Government.

“Explanation.— For the purposes of this section, the word person shall include “distinct persons” as referred to in sub-section (4) or, as the case may be, sub-section (5) of section 25”.

Section 89 – Liability of Directors of Private Company

(1) Notwithstanding anything contained in the Companies Act, 2013, where any tax, interest or penalty due from a private company in respect of any supply of goods or services or both for any period cannot be recovered, then, every person who was a director of the private company during such period shall, jointly and severally, be liable for the payment of such tax, interest or penalty unless he proves that the non-recovery cannot be attributed to any gross neglect, misfeasance or breach of duty on his part in relation to the affairs of the company.

(2) Where a private company is converted into a public company and the tax, interest or penalty in respect of any supply of goods or services or both for any period during which such company was a private company cannot be

recovered before such conversion, then, nothing contained in sub-section (1) shall apply to any person who was a director of such private company in relation to any tax, interest or penalty in respect of such supply of goods or services or both of such private company:

***Provided** that nothing contained in this sub-section shall apply to any personal penalty imposed on such director.”*

(emphasis supplied)

19. A bare reading of section 79 would bring about a cumulative effect that the principal liability is not on the “petitioner” who is not a registered person within the meaning of Section 79(1). Further Section 89 clearly provides that before taking any action of recovery against the directors of the company, a subjective satisfaction is required to be achieved by the concerned officer in regard to whether a person concerned against whom recovery is sought to be made was a director of a Private Limited Company for the concerned period. It is only after such satisfaction to the effect that such person was the director of the company, the liability could be fastened against such director. Thus, as to on what basis the respondents have proceeded to make the attachment of the petitioner’s property, is not known. No reasons are attributed whatsoever except for the impugned order.

20. We would not accept the reasons furnished in the reply affidavit as the same would be contrary to the settled position of law. Thus, there is no manner of doubt that the impugned order passed against the petitioner is illegal and cannot be sustained. It is certainly in breach of the rights guaranteed to the petitioner under Article 14, read with Article 300A, of the Constitution.

21. The Petition accordingly succeeds. It is allowed in terms of prayer clauses (a) and (b), which read thus:

“(a) that this Hon'ble Court be pleased to issue a Writ of Certiorari or a writ in the nature of Certiorari or any other appropriate writ, order or direction under Article 226 of the Constitution of India calling for the records pertaining to the Petitioner's case and after going into the validity and legality thereof to quash and set aside the (I) Order of Attachment No. STO/ MUM-BCP-C-005(Kurla_701)/Recovery/ Attachment/2018-19/2023-24/B-323 dated 11.01.2024 [Exhibit "A"] issued by the Respondent No. 3; and (ii) Notice given by the Respondent No. 3 to IndusInd Bank, Chakala Branch, Andheri (E), Mumbai, for attaching the Current Account No. 201000639140 of M/s. India Hair of which the Petitioner is Proprietor;

(b) that this Hon'ble Court be pleased to issue a Writ of Mandamus or a writ in the nature of Mandamus or any other appropriate writ, order or direction under Article 226 of the Constitution of India ordering and directing the Respondent No. 3 by himself, his subordinates, servants and agents to forthwith:

(i) withdraw/cancel the Order of Attachment No. STO/MUM-BCP-C-005(Kurla_701)/Recovery/Attachment/2018-19/2023-24/B-323 dated 11.01.2024 [Exhibit "A"] issued by the Respondent No. 3;

(ii) Lift the attachment from Flat No. 18, 6th Floor, Trimurti Residency, Plot No. 16, J.B. Nagar, Andheri (E), Mumbai 400 059, owned by and in possession of the Petitioner;

(iii) Revoke the Notice give to IndusInd Bank, Chakala Branch, Andheri (E), Mumbai, for attaching the Current Account No. 201000639140 of M/s. India Hair of which the Petitioner is proprietor;

22. Rule is made absolute in above terms. No costs.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKARNI , J.)