

2012 CLD 1966

[Lahore]

Before Ayesha A. Malik, J

WASEEM YAQOOB—Petitioner

versus

CHIEF COMMISSIONER, INCOME TAX

and others—-Respondents

W.P. No. 18046 of 2012, decided on 16th August, 2012.

(a) Companies Ordinance (XLVII of 1984)—

—Ss.76, 155 & 156—Form-A filed by company for relevant year not reflecting name of petitioner as shareholder of company—Effect—Company could not register a transfer of .shares or debentures without proper instrument of transfer duly stamped and executed by transferor and transferee and delivered to company along with scrips—Provision of 8.76 of Companies Ordinance, 1984 being mandatory in nature, but default in compliance therewith, if any, would be a matter inter se between company and Security Exchange Commission, which could take its cognizance—Such Form-A would be prima facie evidence of matters contained therein, which could not be denied or refuted without cogent evidence—Petitioner not being named in such Form-A ceased to be shareholder of company in relevant year—Principles, [p. 1971} A

Shahana Parvez and 2 others v. Messrs Good luck Trade Impex (Pvt.) Ltd.
Lahore and 6 others 1998 CLC 1157ref.

(b) Income Tax Ordinance (XLIX of 2001)—

Ss.2(66), 91, 138(1) & 139—Income Tax Rules, 2002, R.186—Constitution of Pakistan, Art. 199—Constitutional petition—Failure of petitioner after attaining majority to pay tax due from him for assessment years during his minority as shareholder of company—Issuance of warrants of detention of petitioner under R.186 of Income Tax Rules, 2002 and demand notice under 8.138(1) of Income Tax Ordinance, 2001—Petitioner's plea that for being minor during disputed tax years, he was not a tax-payer, thus, could not be made liable to pay such tax of company—Validity—No person could be made liable for tax of company for assessment years during which he either ceased to be its shareholder or was a minor—Record, in the present case, showed that petitioner was a minor during disputed years, thus, he could, not be made liable for total income tax of company for such years—High Court set aside impugned order of detention while declaring same to be illegal in circumstances, [pp. 1972, 1973] B & C

Shafqat Mahmood Chohan, Mian Muhammad Athar and Abdul Qaddus Mughal for Petitioner.

Asjad Yaqub with Zain-ul-Abadin Addl. Commissioner and Shahid Sattar, Deputy Commissioner, Inland Revenue for Respondents.

Date of hearing: 10th August, 2012.

JUDGMENT

AYESHA A. MALIK, J.—This writ petition impugns the warrant of detention issued under Rule 186 of the Income Tax Rules, 2002, the notice under section 138(1) of the Income Tax Ordinance, 2001 and the order dated 26-6-2012 issued by the respondent No.2.

2. The basic facts of this case are that the petitioner was a shareholder of a company namely, Irum Ghee Mill (Private) Limited ("the Company"). The petitioner owned 15% share of the Company in the year 1994. These shares were sold by the father of the

petitioner in November, 1996 because at the time, the petitioner was a minor, his date of birth being 1-10-1981. The respondents issued a demand against tax due from the Company for the assessment period 1994 to 2003, in the amount of Rs.5,10,983,584. In this regard, notice under section 138(1) of the Income Tax Ordinance, 2001 ("ITO") was issued to the petitioner. Thereafter, on 16-6-2012 an order for the detention of the petitioner was made for not making the required payment of Rs.5,10,983,584. The petitioner filed a writ petition before this Court bearing No. 16464 of 2012 wherein it was ordered on 25-6-2012 that the respondent No.2 should decide the case of the; petitioner qua his detention within 24 hours in accordance with law after providing an opportunity of hearing to the petitioner. In terms of the said order on 26-6-2012, a decision was made by the respondent No. 2 wherein it was held that the petitioner is liable to pay the income tax due from the Company for the period 1994-2003. Furthermore since the petitioner did not make the tax payment, the order of detention was to continue.

3. Essentially, the case of the petitioner is that he was amin or at the time when he was a shareholder of the Company. He had no role to play in the administration of the company and after 1996 he seized to be a shareholder of the Company. Counsel for the petitioner argued that the petitioner was a minor for the period 1994-1996 when lie was a shareholder. That he was not a tax payer in terms of section 2(66) of the Income Tax Ordinance, 2001. The Income of the minor for a tax year is chargeable as tax of the parent of the child in terms of section 91 of the FTO. Hence, the petitioner is not liable to pay the tax of the Company. Finally, section 138 can only be used for recovering tax from a taxpayer, and since the petitioner is not a tax payer, he cannot be made liable to pay the tax of the Company.

4. As a preliminary objection, learned counsel for the respondents raised an objection with respect to the maintainability of this writ petition. He argued that due to the earlier writ petition filed bearing No. 16464 of 2012 and a subsequent Writ Petition No. 17666 of 2012, which was withdrawn by the petitioner, he is not entitled to any discretionary relief. In the event, that the petition is held to be maintainable, at best the case of the petitioner is limited to the order dated 26-6-2012 and its findings in terms thereof. On this issue, I find that

the instant petition is maintainable as the earlier writ petition was filed in relation to the warrant of detention issued on 18-5-2012 and the notice under section 138(1) of the TTO. Thereafter in terms of the order of this court a decision was rendered on 26-6-2012 by the respondent No. 2 Justifying the detention and the claim for the tax of the Company from the petitioner. The instant writ petition impugns the order of 26-6-2012, such that this court is required to determine whether in terms of the said Order the petitioner can be made liable for the tax due from the Company and whether the petitioner can be detained in terms thereof.

5. On the merits of the case, learned counsel for the respondents has argued that the respondents are justified in recovering the tax amount due from the Company from the petitioner on account of section 139(l)(b) of the FTO. He argued that the petitioner, having, attained majority is now liable to pay the entire tax, notwithstanding the fact that he was a minor at the relevant time. He further argued that the petitioner is still a shareholder of the Company as he has brought no document, especially the transfer deeds to evidence the fact that he is no longer a shareholder of the Company. He further argued that the national Interest as well as modus operandi of the petitioner should be considered by this Court, being a court of equitable Jurisdiction.

6. Heard learned counsel for the parties and reviewed the record available on the file.

7. The main issue in this petition is whether the petitioner is liable to pay the tax of the Company under section 139 of ITO. The entire case of the respondent is based on section 139(1) of the Income Tax Ordinance, 2001, which reads as follows: ---

"Notwithstanding anything in the Companies Ordinance, 1984 (XLVII of 1984), where any tax payable by a private company (including a private company that has been, wound up or gone into, liquidation) in respect of any tax year cannot be recovered from the company, every person who was at any time in that tax year-

- (a) a director of the company, other than an employed director; or
- (b) a shareholder in the company owning not less than ten percent of the paid up capital of the company."

shall be jointly and severally liable for payment of the tax due by the company."

By virtue of this section where any tax la payable by a private company, and cannot be recovered from the company, then .every person, who was a Director of the company for the relevant tax period or a shareholder of the company, having not less than 10% shares of the company, for the relevant tax year, can be made liable for the payment of tax due by the company. In order to invoke the provision of this section, the respondents were required to show that the petitioner was a shareholder owning at least 10% shares of the Company for the assessment years 1994 to 2003. In this¹ regard- the respondents have argued that the petitioner is liable on attaining majority and that the petitioner continues to be a shareholder of the Company. Furthermore, the petitioner has placed reliance on his passport, CNIC Card and birth certificate, to show that he was a minor at the time, since his date of birth is 1-10-1981.

8. On 2-8-2012, after hearing both the sides at length, this Court passed an order wherein the respondents were given one week's time to satisfy themselves on the two grounds which form the basis of the petitioner's liability and detention. The first is with respect to the minority of the petitioner and the second is with respect to the petitioner being a shareholder of the Company. On 10-8-2012, the respondents submitted their report in terms of the order of 2-6-2012. I have reviewed the report which provides that in terms of the documents provided by the petitioner the respondents were satisfied that the petitioner continued to be a shareholder of the Company and that with reference to the Issue of minority, the petitioner has not brought any cogent or reliable evidence In support of his claim.

9. In order to appreciate the arguments of both the parties, I will divide the matter in two parts, first on the minority Issue and second on the transfer of share:

Minority

The petitioner submitted the documents available with him to show that he was minor at the time when he was shareholder of the company from 1994 to 1996. All documents show his date of birth as 1-10-1981. However, the respondents question the authenticity of the documents produced before them. The main objection is on the birth certificate, which was

issued on 7-8-2012. The learned counsel for the respondents has stated that since this document has been Issued recently and shows that the date of birth has been entered in the record late, hence It is not reliable. As to the copy of the Old NIC and the passport submitted, the only objection raised by the learned counsel for the respondents' is that the NIC looks suspicious. The petitioner also submitted a copy of the assessment order dated 12-3-2009 for the year 1998-1099 to the year 2000-200 J wherein the Taxation Officer of Income Tax found the assessee, being the petitioner, was a minor at that time. A review of the assessment order shows that it relates to the petitioner and that at the given time, as per the order, the petitioner was a minor. Learned counsel for the respondents does not deny this assessment order. Having reviewed the documents provided by the learned counsel for the petitioner as mentioned above, I am of the opinion that the respondents do not have any valid objection to the documents presented by the petitioner for establishing his date of birth. Every document presented by the petitioner shows his date of birth as 1-10-1981. The fact that the birth certificate was obtained as late on 7-8-2012 will not effect the claim of the petitioner that he was a minor as every other document namely, his NIC and passport provides for the same date of birth being 1-10-1981. However, the more important document is the assessment order issued by a Taxation Officer wherein he has accepted the minority of the petitioner for the assessment years 1998-1999 to 2000-2001 for the purpose of wealth tax. Therefore, there is no basis on which the respondents can deny the fact that petitioner was a minor during the assessment period 1994, 1995 and 1996.

Shareholding

The respondents have argued at length that the petitioner continues to be a shareholder of the Company as he has not been able to show any transfer deed on the basis of which he claims that his shares were transferred in the year 1996. The respondents have placed reliance on section 76 of the Companies Ordinance, 1984 and a case titled "Shahana Parvez and 2 others v. Messrs Good luck Trade Impex (Pvt.) Ltd. Lahore and 6 others" (1998 CLC 1157). In support of his case, the petitioner has placed reliance on the Form-A for the years 1994, 1995 and 1996, which show that the petitioner was a shareholder

and the Form-A for the year 1997 which does not reflect the petitioner as a member of the Company. Section 76 of the Company Ordinance, 1984 (CO. 1984) provides for the transfer of shares. No doubt, the provisions of section 76 are mandatory in nature, .however, the default if any under section 76 is a matter inter Se between the Company and the Security and Exchange Commission of Pakistan (SECP). Section 76(7) of the C.O. 1984 provides that "*in the event of a default under section 76 the company will be liable to a fine and every officer who knowingly or willingly was a party to such default is also liable to a penalty*". This means that if there is any default in compliance with the provision of section 76, it is for the SECP to take cognizance of such a default and Impose a penalty if required. Hence the discrepancies, if any, in the Form-As filed by the Company have to be reviewed for default by the SECP. The judgment relied upon by the learned counsel for the respondents also support my understanding as it holds that "*no company can register a transfer of shares or debentures unless proper instrument of transfer duly stamped and executed by the transferor and the transferee has been delivered to the company along with scrips.*" Furthermore, "*It followed from the above; that in the absence of any Instrument of transfer having been delivered to the respondent: Company, the company was. not justified in omitting the names of the petitioner and the respondent from the register of members and entering the names of respondents in their place as transferees*". Thus in terms of the Judgment, the company has to recognize the transfer of shares. In the instant case it has done so and accordingly, the Company filed the Form A for the year 1997. Furthermore, section 155 of the CO. 1984 provides that the registers referred to in section 156 shall be prima facie evidence of the matters contained therein. Section 156(4) provides that all the particulars to be submitted under section 156(1) and (2) shall have been Entered¹in the register maintained with the company.' Reading both these sections together means that the Form A is prima facie evidence of the matters contained therein and If the respondents refute or deny the information then, it should be through cogent evidence supporting their stance. Since they have nothing in support of their claim that the petitioner is still a shareholder, based on the Form A of 1997 and those filed subsequently 1998-2000 by the Company, the petitioner ceased to be a shareholder of the Company in 1997.

10. Based on the above, the record shows that the petitioner was a minor for the assessment years 1994, 1995 and 1996. The record also shows that the petitioner ceased to be a shareholder of the Company, for the assessment year 1997. Hence, he cannot be made liable for the tax of the Company for the assessment years 1994-2003. The only remaining issue is the argument raised by the respondents that the petitioner is liable for the tax of the Company upon attaining majority under section 39(l)(b) as the tax can be recovered from every person who was a shareholder, holding 10% shares in the relevant tax year. Learned counsel for the respondents argued that this is a *continuing liability* meaning that the minor, upon attaining majority became liable for the tax default of the Company. This argument does not advance the case of the respondents nor does it justify the arrest and detention of the petitioner. The petitioner has been arrested on account of the total default in the payment of income tax for the years 1994-2003, yet he cannot be made liable for the tax default from 1997-2003 since he was not a shareholder for the said period. As to the period 1994-1996, the petitioner was a minor, and he cannot be made liable for the total income tax of the Company for the said period.

11. In view of the aforesaid this petition is accepted. The notice under section 138 issued on 18-5-2012 and the order for detention dated 16-6-2012 and the decision rendered on 26-6-2012 are declared to be illegal and hereby set aside. The petitioner shall be released forthwith if not required to be detained in any other case. No order as to costs.

SAK/W-12/L

Petition accepted.