

IN THE HIGH COURT OF DELHI AT NEW DELHI

Order reserved: February 2, 2009

Date of decision: March 16, 2009

CRL.M.C. No. 1414 of 2008 & CRL.M. No. 5301 of 2008

SAROJ K. DATTA Petitioner

Through : Mr. Siddharth Luthra, Senior
Advocate with Mr. U.A. Rana, Ms.
Arundhati Katju, Mr. Sanjay Pal &
Mr. Abhishek Rao, Advocates

versus

R.L. THAPLIYAL Respondent

Through: Mr. Satish Aggarwala, Advocate

CORAM:

HON'BLE DR. JUSTICE S.MURALIDHAR

1. Whether Reporters of local papers may be
allowed to see the judgment? No
2. To be referred to the Reporter or not? Yes
3. Whether the judgment should be reported in Digest? Yes

JUDGMENT

Dr. S.Muralidhar, J:

1. The prayer in this petition under Section 482 of the Code of Criminal Procedure 1973 ('CrPC') is for quashing of Complaint Case No. 16/08 titled *R.L. Thapliyal v. Saroj K. Datta* pending in the court of the learned Metropolitan Magistrate ('MM'), Delhi under Sections 174 and 175 of Indian Penal Code ('IPC') and all proceedings consequent thereto. The petition also challenges an order dated 7th

March 2008 passed by the learned MM summoning the Petitioner for the aforementioned offences.

2. The aforementioned complaint was filed by R.L.Thapliyal the Senior Intelligence Officer, Directorate General of Central Excise Intelligence ('DGCEI') New Delhi. In para 2 of the complaint it was stated that the complainant is a competent person as required under Section 14 of the Central Excises Act 1944 (CE Act), as made applicable in respect of Service Tax matters vide Section 83 of the Finance Act 1994.

3. The complaint states that DGCEI is investigating a case of non-payment of Service Tax by Sahara Airlines Limited ['SAL'] (now Jetlite India Limited) ['JIL'] which was providing taxable services to Sahara India Commercial Corporation Limited ('SICCL') but was not discharging the service tax liability on the amounts received. According to the complainant, the documents obtained from SAL revealed that SAL was rendering taxable services to SICCL for which they received more than Rs.1400 crores from SICCL during the period 2003-04 to 2006-07 and the service tax liability was estimated more than Rs.100 crores.

4. According to the complainant, since Saroj K. Datta (Petitioner) is presently the Director and authorized signatory of JIL, "his statement was necessary" and constituted crucial evidence in the case against

SAL. The Petitioner was therefore issued summons dated 27th December 2007 for his appearance before the Complainant on 14th January 2008. He was also asked to submit documents. However, the petitioner failed to appear. Instead he sent a letter dated 14th January 2008 stating that he had been appointed Director of JIL with effect from 20th April 2007 consequent upon the change in management and that since the service tax enquiry related to the period prior to the change of management, he was neither aware of the facts nor had knowledge of the concerned transactions. The complaint acknowledges that the Petitioner stated in the said letter that prior to the change in management of JIL Shri R.S. Dubey of the Sahara Group was the authorized signatory and was aware of the entire facts and would therefore be able to explain the matter. The Petitioner asked his reply to be treated by the Complainant as sufficient compliance of the summons issued to him.

5. Another summons dated 15th January 2008 requiring the Petitioner to appear on 23rd January 2008 was issued by the Senior Intelligence Officer. This time, Shri J.P Tiwari, Manager of JIL sent a letter dated 23rd January 2008 stating that the Petitioner had been appointed as Director of JIL with effect from 20th April 2007 and that he was in the process of discussing the service tax issues with the earlier management to enable him to take stand on behalf of the company. Accordingly, time was sought. Another summons was issued on 23rd January 2008 for the appearance of the Petitioner on 29th January

2008. This time also he sent a letter reiterating that the enquiry relating to the period prior to the change of management and the Petitioner had been appointed as Director and he was not aware of the facts and requested that the reply sent by him be treated as sufficient compliance of the summons issued to him. The Senior Intelligence Officer issued another summons dated 4th February 2008 for the appearance of the Petitioner on 13th February 2008. A reply to the summons was sent on 13th February 2008 by JIL stating that the Petitioner was pre-occupied in the company affairs and would appear in person on 18th February 2008. The Petitioner did appear before the Deputy Director, DGCEI, New Delhi on 18th February 2008 and requested that his statement to be recorded on 22nd February 2008. On 22nd February 2008 the petitioner sent by fax a letter and did not appear in person. On the above basis of the above averments the Complainant filed the aforementioned complaint in the court of the learned MM on 5th March 2008 contending that the Petitioner had committed offences punishable under Sections 174 and 175 IPC. The summons was issued by the learned MM by an order dated 7th March 2008 which has been challenged in the present petition before this Court.

6. On the first date of hearing of this case on 2nd May 2008, the following order was passed by this Court:

“The present petition has been filed under Section 482 Cr.P.C. for quashing of Complaint Case No.

16/2008 pending before the court of Shri Praveen Singh, Metropolitan Magistrate, Patiala House New Delhi as well as the impugned order dated 7th March 2008.

Learned counsel for the Petitioner states that the service tax inquiry being conducted by the respondent relates to the period prior to the change in Management of the company and therefore, the petitioner is neither aware of the facts nor has knowledge of the modus operandi of the concerned transactions. Mr. Luthra, learned Senior Advocate for the Petitioner states that the Petitioner had in fact appeared in person before the Respondent on 18th February 2008. Mr. Luthra further states that the Petitioner is even otherwise ready and willing to appear before the Respondent.

Mr. Aggarwal appears for the Respondent and he makes a statement that the Respondent is willing to record Petitioner's statement on any date convenient to the Petitioner. On instructions Mr. Luthra states that he would appear before the Respondent on 7th May 2008 at 100 AM on which date the Respondent would record the Petitioner's statement. In case the investigation is not over on that particular date, the Petitioner would appear on any subsequent date that is mutually convenient to the Petitioner and respondent.

List the matter on 7th May 2008 at 2.00 PM.”

7. Thereafter on 7th May 2008 the following order was passed:

“Mr. Agarwal, learned counsel for the Respondent states that the Petitioner has appeared before the Respondent today. The Petitioner’s statement is in the process of being recorded under Section 14 of Central Excise Act. Mr. Luthra, learned counsel for the Petitioner, on instructions states that the Petitioner will fully cooperate with the investigation and would appear on any subsequent date that may be mutually fixed between the Petitioner and the respondent.

Issue notice. Mr. Aggarwal accepts notice on behalf of the respondent. Mr. Aggarwal prays for two weeks time to file a reply.

List the matter on 29th May 2008.

Till the next date of hearing I stay the proceedings in Complaint No. 16/2008 pending before Sh. Praveen Singh, MM, Patiala House, New Delhi.
Dasti under the signature of Court Master.”

8. On 21st January 2009 this Court required the learned counsel for Respondent to ascertain if the Petitioner was required to appear further before the officer concerned and the interim stay was directed to be continued. At the next hearing Mr. Satish Aggarwala, learned counsel for the Respondent submitted that though the presence of the petitioner may not be further required, the investigations were inconclusive and therefore the Complaint would neither be rendered infructuous nor could it be quashed on the ground that the petitioner

had been appearing before the Complainant pursuant to the orders of this Court. Consequently, the arguments on merits were finally heard by this Court.

9. It is submitted by Mr. Luthra, learned Senior counsel appearing for the Petitioner that in the first instance the complaint itself was not maintainable since it was not filed by a person duly authorized in terms of Rule 3 of the Service Tax Rules 1994 which requires a special notification to be issued appointing a Central Excise Officer to exercise the powers conferred under Chapter V of the Finance Act 1994. It is stated that the Respondent failed to furnish along with the Complaint or even before the learned MM a copy of any such notification.

10. It is next submitted that even if the averments in the complaint are taken to be true, they do not make out a prima facie case for proceeding against the petitioner for the offences under Sections 174 and 175 IPC. Mr. Luthra points out that notices are in a standard format which do not specify the document to be produced by the noticee. The summons in question require the noticee to attend the office of DGCEI, “to give evidence, to make statement and/or produce the documents and things” mentioned in the schedule “for examination.” The schedule to the summons simply states “for tendering evidence.” Since no documents were asked to be produced, the question of applicability of Section 175 IPC would not arise.

Reliance is placed upon the decision of this Court in *Meera Kapoor v. State & Another 2008 [2] JCC 829*.

11. It is next submitted that as regards the summons dated 27th December 2007 addressed to the Petitioner it was in fact not served on the Petitioner but on J.P. Tiwari. A reply to the said letter was indeed sent by the Petitioner on 14th January 2008 as stated in the complaint. The explanation by the Petitioner showed that there was no deliberate intention of not appearing before the Complainant. It is pointed out that the next notice dated 15th January 2008 was also served on J.P. Tiwari and not the Petitioner. It was J.P. Tiwari who sent a reply on 23rd January 2008. The third notice dated 23rd January 2008 addressed to the Petitioner was also not served on the Petitioner. It was J.P. Tiwari who sent a reply on 29th January 2008. The fourth notice dated 4th February 2008 was addressed to O.P. Srivastava, Director of SAL and not to the Petitioner at all. Reply was sent again by J.P. Tiwari on 13th February 2008.

12. The Petitioner does not deny that he appeared before the Deputy Director, DGCEI on 18th February 2008 and further sent a letter dated 22nd February 2008 wherein inter alia it was stated as under:

“3. Since the receipt of your notice, we have consulted our lawyers and advisors including the ex-Solicitor General of India who have advised us that the basis on which summons have been issued to us are on mere technical grounds. Accordingly,

they are of the opinion that this issue is wide open for interpretation. Accordingly we have been advised that there is no requirement for us to make any payment prior to the due process being followed. I am also advised that the recording of a statement of any person is by way of evidence – I have no personal knowledge of my facts that would be relevant for obvious reasons. The question of my making a “statement” in response to your summons on whether we would agree to pay tax, I am advised, does not arise.

4. During my meeting with you on 18th February 2008, you specifically asked me to confirm our willingness to pay (under protest) and schedule of such payment. In this respect, we would like to submit that we have briefed our Board of this matter and our Board, in turn, has decided to engage a team of lawyers and advisors to handle the matter. However, if you feel that it is necessary for me to meet you, I will make my courtesy visit at any date suitable to you during the next week.

However, we will extend our full cooperation and support to your department in this matter.”

It is submitted that in the background of the above facts it cannot be said that the Petitioner was deliberately avoiding the summons which was an essential ingredients of Sections 174 & 175 IPC.

13. In reply Mr. Aggarwala learned Senior standing counsel for the

Department produced a copy of the notification No. 3/2004-S.T. dated 11th March 2004 as corrected by Corrigendum F. No. 137/14/2003-CX,4 dated 29th March 2004 in terms of which the Superintendent, Central Excise Intelligence has been appointed in terms of Rule 3 of the Service Tax Rules 1994 read with Section 65 (4) of the Finance Act 1994 as Central Excise Officer and invested with all the powers exercisable by the Chief Commissioner of Central Excise. It is submitted that the Complainant accordingly was duly authorized in terms of the Finance Act 1994 to file a complaint. It is pointed out that in another case investigated by the Delhi Zonal Unit of DGCEI the petitioner did not appear in compliance of summons issued to him in that case. The summons was issued to the Petitioner pursuant to the show cause notice issued to JIL by the Additional Director (G) DGCEI on 2nd/3rd October 2008 in relation to non-payment of service tax amounting to Rs.1,42,45,93,066/- during the period from July 2003 to January 2007. It is submitted that despite several summons as indicated hereinabove, the Petitioner had failed to appear before the officers and therefore, it cannot be said that not even a prima facie case under Section 174 IPC was made out against the Petitioner. As regards the offence under Section 175 IPC although Mr. Aggarwala does not dispute that fact that schedule to the notice does not indicate the documents required to be produced. He submits that since the Petitioner never appeared before the officer, the occasion for requiring any document to be produced does not arise.

14. The submissions of learned counsel on both sides have been considered.

15. As regards the competence of Respondent No.1 to file the complaint, Section 65 (4) of the Finance Act 1994 defines “Central Excise Officer” to have the same meaning as in the Section (2)(b) of the CE Act. In terms of Section 94 of the Finance Act, the Central Government has the power to make rules for carrying out the provisions of that Chapter. In terms thereof the Service tax Rules 1994 have been made. Rule 3 thereof states that “the Central Board of Excise and Customs may appoint such Central Excise Officers as it thinks fit for exercising the powers under Chapter V of the Finance Act 1994 within such local limits as it may assign to them as also specify the taxable service in relation to which any such Central Excise Officers shall exercise his powers.” While it is true that summons issued in the present case to the Petitioner by the Respondent merely states that the Petitioner has been summoned under Section 14 CE Act, it is seen that the said provision has been made applicable to service tax matters vide Section 83 of the Finance Act 1994. The notification dated 11th March 2004 as amended by the subsequent notification dated 29th March 2004 has been issued specifically in terms of Rule 3 of the Service tax Rules read with 65 (4) of the Finance Act 1994. It designates the Superintendent, Central Excise Intelligence as a Central Excise Officer and invests him with the powers of the Superintendent of Central Excise for whole of India

and it stipulates that such powers are the “powers of a Central Excise Officer conferred under Chapter V of the Finance Act 1994 and the Service Tax Rules 1994 regarding any taxable service.” The Respondent R.L. Thapliyal has signed all summons as “Senior Intelligence Officer/Superintendent, Central Excise. In the circumstances, there is no merit in the contention of the Petitioner that R.L. Thapliyal was not competent to authorized to issue summon and consequently filed the complaint. The first issue is, therefore, answered against the Petitioner.

16. The second issue concerns Section 175 IPC which reads as under:

“Section 175: Omission to produce to document or electronic record to public servant by person legally bound to produce it : Whoever, being legally bound to produce or deliver up any document or Electronic Record of any public servant, as such, intentionally omits so to produce or deliver up the same, shall be punished with simple imprisonment for a term which may extend to one month, or with fine which may extend to five hundred rupees, or with both; Or, if the document or Electronic Record is to be produced or delivered up to a Court of Justice, with simple imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both.”

17. It is plain from a reading of the above provision, that the offence is attracted only in the event that a person, who is legally bound to

produce or deliver up any document or Electronic Record of any public servant, as such, intentionally omits to do so. Where no such document has been asked to be produced by the public servant, the question of the applicability of Section 175 IPC does not arise. In each of the summons referred to hereinabove issued by the Respondent to the Petitioner, there is no description of any document in the schedule to the summons although in the body of the summons it is stated that the Petitioner should produce documents. The schedule simply states “for tendering evidence”. There is no failure by the Petitioner to produce any documents. No such document has been asked to be produced by the Respondent. Consequently there is no question of even a prima facie case being made out for summoning the petitioner for the offence under Section 175 IPC.

18. The third issue concerns the offence under Section 174 IPC. The requirement under that provision is that the person concerned should intentionally omit to appear before the public servant in response to summons issued by such public servant who is legally competent as such public servant to issue summons. The question is whether on the facts and circumstances of the present case, the Petitioner intentionally failed to comply with the summons issued by the Respondent.

19. On reading of the entire complaint this Court is unable to discern any intentional or deliberate omission on the part of the Petitioner to

respond to the summons. The background of the case shows that the alleged offence of payment of service tax by SAL was pertained to the period prior to its take over by JIL. It is true that the summons dated 27th December 2007 was not received by the Petitioner but by J.P. Tiwari. A reply thereto was nevertheless sent by the Petitioner. The second summons dated 15th January 2008 was addressed to the Petitioner received by J.P. Tiwari and reply sent by J.P. Tiwari on 23rd January 2008. The third summons dated 23rd January 2008 which was addressed to the Petitioner and replied to by J.P. Tiwari on behalf of the Petitioner. The fourth summons dated 4th February 2008 was addressed to O.P. Srivastava, Director. The letter dated 18th February 2008 merely indicates that the Petitioner attended the office of Deputy Director, DGCEI and requested that his statement be recorded on 22nd February 2008. Thereafter on 22nd February 2008 the Petitioner wrote a further letter explaining why he was not prepared to make a statement.

20. It appears to this Court on a conspectus of the above facts that the Petitioner could not be said to have deliberately avoided answering the summons or attending the office of DGCEI. Further, whatever may have been the position about the appearance of the Petitioner before the DGCEI earlier to the filing of the present petition, he did appear before the DGCEI pursuant to the order dated 2nd May 2008 of this Court. The petitioner has also expressed his willingness to appear before the Respondent thereafter as well. In the circumstances, the

filing of the complaint for the offence under Section 174 IPC by the Respondent against the Petitioner was really not warranted. In the facts and circumstances of the present case, this Court holds that not even a prima facie is made out against the Petitioner for the offence under Section 174 IPC.

21. Accordingly, the Complaint Case No. 16/08 titled ***R.L. Thapliyal v. Saroj K. Datta*** pending in the court of the learned MM Delhi under Sections 174 and 175 of IPC and all proceedings consequent thereto including the order dated 7th March 2008 passed by the learned MM summoning the Petitioner for the aforementioned offences are hereby quashed.

22. The petition is accordingly allowed and the application is disposed of. A certified copy of this order be sent to the learned MM concerned forthwith.

S. MURALIDHAR, J.

MARCH 16, 2009

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