

IN THE HIGH COURT OF DELHI AT NEW DELHI

+ Cr1.M.C.3583/2009

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Date of Reserve : 20.10.2009

Date of Decision: 30.10.2009

VICTORIANO P. DUNGCA Petitioner

Through: Mr. Siddharth Luthra, Sr. Adv.
with Mr. U.A. Rana, Mr. Abhishek
K. Rao, advs.

Versus

\$ R.L. THAPLIYAL Respondent

Through: Mr. Satish Aggarwala, Adv.

CORAM:

HON'BLE MR. JUSTICE MOOL CHAND GARG

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | YES |
| 2. | To be referred to Reporter or not? | YES |
| 3. | Whether the judgment should be reported in the Digest? | YES |

MOOL CHAND GARG,J

1. This petition under Section 482 of the Code of Criminal Procedure, 1973 (Cr.P.C.) assails the summoning order dated 24.04.2009 passed in a complaint filed by the respondent against the petitioner under Sections 174 and 175 of the Indian Penal Code, 1860 (I.P.C.) pending in the Court of Additional Chief Metropolitan Magistrate, Patiala House Courts, Delhi.
2. One of the main contentions raised on behalf of the petitioner was that in the aforesaid case, the summons calling upon the

petitioner to appear for interrogation in the office of the respondent was not served upon the petitioner in accordance with Section 37C of the Central Excise Act and therefore, once this service was not effected in accordance with the said provision the question of violating the provisions of Sections 174 and 175 of the IPC on the part of the petitioner did not arise.

3. To appreciate the contentions of the parties, it would be appropriate to take note of Section 37C of the Central Excise Act, which reads as under:

37C- Service of decisions, orders, summons, etc. .

– (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -by tendering the decision, order, summons or notice, or sending it by (a) registered post with acknowledgment due, to the person for whom it is intended or his authorised agent, if any;if the decision, order, summons or notice cannot be served in the (b) manner provided in clause (a), by affixing a copy thereof to some conspicuous part of the factory or warehouse or other place of business or usual place of residence of the person for whom such decision, order, summons or notice, as the case may be, is intended;if the decision, order, summons or notice cannot be served in the (c) manner provided in clauses (a) and (b), by affixing a copy thereof on the notice board of the officer or authority who or which passed such decision or order or issued such summons or notice.

Every decision or order passed or any summons or notice (2) issued under this Act or the rules made thereunder, shall be deemed to have been served on the date on which the decision, order, summons or notice is tendered or delivered by post or a copy thereof is affixed in the manner provided in subsection (1).

4. It would also be appropriate to take note of the provisions contained under Sections 174 and 175 of the IPC, which are as under:

174. Non-attendance in obedience to an order from public servant:

Whoever, being legally bound to attend in person or by an agent at a certain place and time in obedience to a summons, notice, order or proclamation proceeding from any public servant legally competent, as such public servant, to issue the same, intentionally omits to attend at that place of time, or departs from the place where he is bound to attend before the time at which it is lawful for him to depart,

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 summons, notice, order or proclamation is to attend in person or by agent in 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.

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.

5. Briefly stating the facts of this case are that a complaint has been filed by the respondent who is the Intelligence Officer

working in the Office of the Director General, Central Excise being complaint No.2694/1 alleging that the petitioner has committed offences under Sections 174 and 175 of the IPC and it is on that basis, the impugned orders dated 24.04.2009 and 10.06.2009 have been passed. In the complaint, it was alleged that:

3. The Directorate General of Central Excise Intelligence had booked a case of evasion of Service Tax against M/s Jetlite India Ltd. (earlier M/s Sahara Airlines Ltd.). The accused is a Director of M/s Jetlite India Ltd. who was looking after commercial matters of Jet Group of Companies. As per statement dated 12.05.2008 of Sh. Saroj K. Datta, another Director of M/s Jetlite India Ltd., the accused was also instrumental during negotiation leading to sale of M/s Sahara Airlines Ltd. to M/s Jet Airways. The accused was summoned under Section 14 of the Central Excise Act, 1944 read with Section 83 of the Finance Act, 1994, for enquiries.
4. The complainant issued summons dated 11.6.2008 for the appearance of accused on 23.06.2008. The accused was also asked to produce certain documents. Instead of appearing for enquiries Shri Saroj K. Datta, another Director of M/s Jetlite (India) Ltd., in response to said summons dated 11.06.2008, vide his letter dated 23.06.2008, submitted that Shri Vic. Dungca was pre-occupied with his pre-scheduled commitments in Mumbai and was unable to appear on the assigned date and requested to grant an adjournment and re-fix the matter at some latter date.
5. The complainant, vide summons dated 09.07.2008 again summoned the accused for appearance on 17.07.2008. Shri Saroj K. Datta, another Director of M/s Jetlite (India) Ltd., in response to said summons dated 09.07.2008, vide his letter dated 17.07.2008, submitted that

Shri Vic. Dungca was currently out of India and was expected to be back by 30.07.2008 and requested to grant an adjournment preferably for 30.07.2008. Shri Vic Dungca did not comply with the same even on 30.07.2008 or thereafter.

6. From the aforesaid facts, it is clear that the accused is deliberately avoiding joining enquiries despite service of summons and is not submitting the requisitioned documents and thus, the accused has committed offences punishable under Sections 174 & 175 of the IPC.

6. It would thus be appropriate to take note of the summons issued to the petitioner. A perusal of the summon appearing at page 28 of the paper book issued on 11-12/06/2008 goes to show that the said summon was issued at the office of M/s Jetlite (India) Ltd., A-110, Road No.5, NH-8, Mahipalpur Extension, Delhi. It was not sent at the residential address of the petitioner who is residing abroad. Reply was sent to the aforesaid notice by the Executive Director, which reads as under:

“June 23, 2008

To,
The Senior Intelligence Officer,
DGCE Intelligence,
West Block VIII, Wing No.-VI,
R.K. Puram, New Delhi.

Dear Sir,

Re: Jet Lite (India) Ltd. (Formerly known as Sahara Airlines Ltd.) Summon u/S 83 of the Finance Act, 1994 read with Section 14 of

**Central Excise Act, 1944 (F.
No.124/INT/DGCEI/HQ/07/4455).**

Sub: Request for adjournment.

We draw your goodself's attention to Summon F. No.124/INT/DGCEI/HQ/07/4455 dated 11.06.2008 issued by your goodself wherein Shri Vic Dungca, Director of Jet Lite (India) Limited, is required to appear before your goodself in person on 23.06.2008 (copy enclosed)

In this regard we submit that Shri Vic Dungca is pre-occupied with his pre-scheduled commitments in Mumbai and is unable to appear before your goodself on the assigned date. Hence, we request your goodself to kindly grant an adjournment and re-affix the matter at some later date and oblige.

We regret causing any inconvenience and hope that your goodself will consider our request favourably.

Thanking You,

Yours Faithfully,
For **Jet Lite (India) Ltd.**

sd/-

Saroj K. Datta
Executive Director."

7. Another notice was sent on 04.07.2008 again at the officer of the Company. To the same again a reply was sent where it was stated:

"July 17, 2008

To,
The Senior Intelligence Officer,
DGCE Intelligence,
West Block VIII, III(F.F.),
R.K. Puram, New Delhi. Kind. Attn.:Mr. S. Das.

Dear Sir,

**Re: Jet Lite (India) Ltd. (Formerly known as
Sahara Airlines Ltd.) Inquiry about Evasion
of Service Tax.**

Sub: Summons for Shri Vic Dungca, Director, Jet Lite.

We draw your to Summon F. No.DZU/INV/ST/19/2004/Pt./2830 dated 04.07.2008 summoning Shri Vic Dungca, Director, Jet Lite (India) Limited, to appear before you in person in connection with the above inquiry on 11.07.2008 (copy enclosed)

In this regard kindly note that the above referred Summon has been received in our offices only today, i.e., 17th July, 2008 and hence it was not possible for Shri Vic Dungca to be present in your office on the date specified therein.

Kindly also note that Shri Vic Dungca is a US national and a resident of USA. Accordingly, adequate notice would be required to enable him to present himself in your office in person.

Thanking You,

Yours Faithfully,
For **Jet Lite (India) Ltd.**

sd/-
Saroj K. Datta
Executive Director."

8. A third notice was sent on 09-10/06/2008 but again at the address of the Company and not at the residential address of the petitioner which was also replied as follows:

"July 17, 2008

To,
The Senior Intelligence Officer,
DGCE Intelligence,
West Block VIII, Wing No.-VI,
R.K. Puram, New Delhi.

Dear Sir,

Re: Jet Lite (India) Ltd. (Formerly known as Sahara Airlines Ltd.) Summon u/S 83 of the

**Finance Act, 1994 read with Section 14 of
Central Excise Act, 1944 (F.
No.124/INT/DGCEI/HQ/07).**

Sub: Request for adjournment.

We draw your goodself's attention to Summon F. No.124/INT/DGCEI/HQ/07 dated 10.07.2008 issued by your goodself wherein Shri Vic Dungca, Director of Jet Lite (India) Limited, is required to appear before your goodself in person on 17.07.2008 (copy enclosed)

In this regard we submit that Shri Vic Dungca is currently out of India and is expected to be back by 30.07.2008. Hence we request your goodself to kindly grant an adjournment preferably for 30.07.2008 and oblige.

We regret causing any inconvenience and hope that your goodself will consider our request favourably.

Thanking You,

Yours Faithfully,
For **Jet Lite (India) Ltd.**

sd/-

Saroj K. Datta
Executive Director."

9. One of the documents which was asked for being produced by the petitioner, namely, report of M/s Earnest and Young, stated to have been already supplied to the respondent which fact is not disputed by the respondent. The main contention is that since these notices were not served upon the petitioner, the respondent have not complied with the provisions of Section 37C which requires personal service.
10. It is, thus, submitted that the question of violating the said provisions or attracting penalty under Sections 174 & 175 of the

IPC does not arise in the present case.

11. Additionally, it was also submitted that in the present case while a show cause notice was issued to the company and the Managing Director, no show cause notice was issued to the petitioner. Thus, it is apparent that no role was played by the petitioner and the information could have been supplied by the current Directors and who have done the needful and, therefore, even otherwise there is no reason to pursue the matter as is being done on behalf of the respondent. It is submitted that it is an abuse of the process of Court and requires interference by this Court. It is a matter of record that as per Form 32, he is a non-executive Director of the company whose category is professional in nature and he was not even in-charge of the day-to-day work of the company at the relevant time.
12. On the other hand, learned counsel appearing for the respondent submits that the service has been effected on the petitioner at the office address of the Company of which he was a Director. The said Company duly acknowledged the receipt of summons upon the Director and also replied to the notices. It is submitted that non-appearance of the petitioner when he was supposed to appear is apparently *mala fide* and intentional.

It is not a case where it can be said that the petitioner was not aware about the service of summons. The only thing is that he was not ready and willing to come and join for interrogation which calls for a penalty under Sections 174 & 175 of the IPC. It is submitted that there is no infirmity in the order of summon, if at all, there was any defence available to the petitioner he can always lead his defence during the course of trial.

13. However, the aforesaid submission made on behalf of the complainant/respondent are untenable in law for the simple reason that provisions contained under Section 37C of the Central Excise Act (supra) provides for a personal service on the incumbent which unless tendered personally may also be sent by registered post with due acknowledgment. Admittedly, in the present case neither the summons have been tendered personally nor they have been sent by registered post.
14. In the case of Metal Powder Co. Ltd. Vs. Commr. of C.Ex.(Appeals), Tiruchirapalli 1997 (89) ELT 475 (Mad) where provisions under Section 37C of the Central Excise Act came up for consideration, Madras High Court has been pleased to observe:

5. Further in the instant case, the impugned order has been communicated to the petitioner by means of a telegram. The original order signed by the first respondent has not been communicated to the petitioner. It is not in accordance with law and procedure laid down under Section [11\(1\)\(a\)](#) of the

Act. Section [37C](#) prescribes the mode of service of decisions, orders, summons, etc., under the act. In this connection, Section [37C\(1\)\(a\)](#) reads as follows :-

"37C. Service of decisions, orders, summons, etc. : (1) Any decision or order passed or any summons or notices issued under this Act or the rules made thereunder, shall be served, -

(a) by tendering the decision, order, summons of notice, or sending it by registered post with acknowledgement due, to the person for whom it is intended or his authorised agent, if any;

In the instant case, the procedure given for service of the appellate order has not been complied with as the first respondent has only communicated the order by telegram and has not sent the original order signed by him by registered post with acknowledgement due.

6. In view of the above, the impugned order is quashed and set aside. The first respondent shall give a notice of personal hearing to the petitioner and dispose of the petition filed by the petitioner-company under section [35F](#) of the Act, in accordance with law within two months from the date of receipt of copy of this order. This writ petition is ordered accordingly. No costs. Consequently, no orders are necessary in W.M.P. Nos. 18750 and 18751 of 1996.

15. A similar view has been taken by Gujarat High Court in the case of Rajshree Dyeing and Printing Mills Pvt. Otd. Vs. Union of India 2005 (190) ELT9(Guj). The relevant portion of the observations made in the said judgment are reproduced hereunder:

5. In the circumstances, the averments made by the petitioner regarding non-service of the order of Commissioner (Appeals) have remained uncontroverted. Reliance on behalf of the respondents on provisions of Section [37C](#) of the Central Excise Act, 1944 are besides the point inasmuch as the said provision also requires that the order must be served by registered post with acknowledgment due. The respondent authorities have failed to show by tendering any evidence on record that in fact the

order has been served as in absence of the acknowledgment receipt in possession of the respondent authorities, the certificate issued by the postal authorities remains undisputed.

6. The petition is, accordingly, required to be allowed. The respondent authorities are directed to serve a copy of the order of Commissioner (Appeals) bearing OIA No. YPP/805/SRT/2003, dated 24th November, 2003 on or before 2nd July, 2005. The petition is allowed to the aforesaid extent. Rule made absolute. The respondent authorities shall pay the costs quantified at Rs. 1,500/-.

16. Accordingly, the petition is allowed. The complaint filed by the respondents against the petitioner under Section 174 & 175 of IPC pending in the Court of Addl. Chief Metropolitan Magistrate, Patiala House, New Delhi and all the proceedings emanating therefrom are accordingly quashed. The bail bond, if any, of the petitioner will stand discharged. Copy of the order be sent to the Trial Court for information.

Crl.M.A.12146/2009

In view of the orders passed above, the application stands disposed of.

MOOL CHAND GARG, J.

OCTOBER 30, 2009
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