***<u>IN THE HIGH COURT OF JUDICATURE AT BOMBAY</u>***

***CIVIL APPELLATE JURISDICTION***

**WRIT PETITION NO. 10250 OF 2015**

M/s Quality Fabricators and Erectors ..Petitioner

Vs.

The Deputy Director, DGCEI, Zonal Unit
Mumbai and Others ..Respondents

Mr. Prakash Shah a/w Mr Anil Balani, Mr Ajay Singh, Mr Sagar Kasar i/b PDS Legal, for the Petitioner.

Mr. V. M. Thorat a/w Mr Jitendra B. Mishra,for Respondent Nos.1 and 2.

Mr Praddep S. Jetly a/w Mr Jitendra B. Mishra, for Respondent No.3.

CORAM :- **S.C. DHARMADHIKARI &**
**B.P. COLABAWALLA, JJ.**
DATE :- **NOVEMBER 17, 2015.**

**<u>P. C.:</u>**

Rule. The contesting Respondent waives service. By consent rule made returnable forthwith.

2 The Petitioner by this Writ Petition under Article 226 of the Constitution of India is challenging the notices at Annexure-E to the Writ Petition by which the Respondent Bank other than the statutory authorities have been directed not to allow the Petitioner to operate the bank accounts. These bank accounts have been frozened pursuant to the communications from the Directorate General of Central Excise Intelligence, Mumbai Zonal Unit.

3 The Petitioner before us is a sole Proprietor carrying on business in the name and style mentioned in the cause title. Respondent Nos. 1 and 2 are the Deputy Director and Additional Director General in the Directorate General, Central Excise Intelligence. These are officers invested with powers of investigation under the Central Excise Act, 1944. They can also investigate the places of evasion and non payment of service tax under Chapter-V of the Finance Act, 1994. The 3rd Respondent is the officer empowered under the provisions of this Chapter and he has jurisdiction over the Petitioner. The 4th Respondent is the

Union of India and Respondent Nos. 5 to 7 are the Banks where the Petitioner has a current account. The 8th Respondent is the Government of India undertaking and debtor of the Petitioner. According to the Petitioner, it owes substantial sum of money.

4 The Petitioner is carrying on business of fabrication and erection of plants, structures etc. The Petitioner undertakes the projects on turn key basis as well as on work contract basis. The Petitioner has been registered as an assessee with the Service Tax Department since 2008. The Petitioner claims that he has been filing periodical returns under the applicable law.

5 The Directorate General of Central Excise Intelligence searched the office premises of the Petitioner at Navi Mumbai on 16th May, 2014 and seized certain records and documents. On extensive investigation and on recording of the statement of the Petitioner, a show cause cum demand notice dated 15th October, 2014 demanding the service tax in the sum of Rs.2,49,63,812/- came to be issued and served on the Petitioner. The allegation is

that the Petitioner has not discharged its liability to pay service tax in full and that is why the demand ought to be raised and the amount of service tax recovered from him.

6 A reply was given to this show cause notice on 17th July, 2015 denying all the allegations and asserting that the service tax due and payable in law has been paid. The Petitioner requested for a personal hearing.

7 The Additional Director, however, has not placed the matter for a personal hearing nor has he passed any order on the show cause notice. However, the allegation in the Petition and throughout is that instead of any adjudication in relation to the demand and pursuant to the show cause notice, the banks have been intimated to freeze the accounts. Thus, the recovery proceedings have been initiated without any adjudication order being passed. Once the Petitioner came to know that the notices have been issued under Section 87 of the Finance Act, then, the Petitioner has got in touch with the department and has arranged

to make payment of Rs.55,84,005/- in cash and Rs.42,34,507/- through CENVAT credit totaling to Rs.98,18,512/-. The Petitioner, therefore, has moved this Court alleging that the show cause notice ought to have been taken to its logical end and conclusion. Before any adjudication order has been passed and in terms of this show cause notice and a personal hearing, there is no question of any recovery and by addressing such communications to the bank. In these circumstances, the writ jurisdiction of this Court is invoked.

8 Reliance has been placed on the language of Section 87 of the Finance Act and Mr Prakash Shah appearing for the Petitioner would submit that it is only when any amount payable by the person to the credit of the Central Government under any of the provisions of Chapter V or the Rules made thereunder is not paid, then, the Central Excise Officer shall proceed to recover the same by the modes mentioned in the said provisions. He would submit that the word 'payable' has definite legal connotation. That presupposes that there is a determination and adjudication so also crystallization of the dues. It is only upon such an exercise that the

modes can be resorted to. In the present case, a direct recovery action is therefore not in accordance with law. Mr Shah places reliance upon the following judgments and orders including of this Court:-

*(a) Harshad Shantilal Mehta v/s Custodian and Others (1998)5 SCC 1.*

*(b) Lawson Tours and Travels(India)Pvt Ltd v/s Deputy Director, DGCEI,Zonal Unit, Mumbai (2015(317)E.L.T.248(Bom)*

*(c) ICICI Bank Ltd v/s Union of India 2015(38) S. T. R. 907. (Bom.)*

*(d) Order dated 31st March 2015 in Writ Petition No.3313 of 2015(Vodafone India Ltd v/s Union of India and Others)*

*(e) Tata Teleservices Maharashtra Ltd v/s M. F. Department of Revenue( 2014(307) E. L. T. 90(Bom.)*

9 The factual position has not been denied or disputed. However, Mr Jetly appearing on behalf of the Respondents strenuously urged that it is not necessary in the facts and circumstances of the present case to wait for any adjudication because the dues which are admitted, remain unpaid. He would invite our attention to page 56 of the paper book wherein the Directorate General of Central Excise Intelligence in a

communication dated 30th October, 2014 addressed to the Federal Bank states that investigations conducted reveal that the Petitioner service provider has provided the services of work contract. In addition to the consideration towards services the amount of service tax has been charged and duly recovered. If the service recipients have paid that tax to the Petitioner and the Petitioner has failed to remit this admitted sum to the Government, then, the notices under Section 87 can be issued and that is how Mr Jetly would justify the impugned action.

10 He would therefore submit that this is not a fit case for interference in writ jurisdiction and equally the judgments relied upon do not have any application to the peculiar facts and circumstances of this case.

11 With the assistance of both counsel, we have perused the Petition and its Annexures.

12 It is common ground that Annexure-A is a copy of the

show cause notice dated 15th October, 2014. It is addressed to the very Petitioner before us. It refers to the collection of service tax allegedly by the Petitioner and it is not remittance to the Government. This was revealed during the search carried out. This was also revealed from the documents which have been seized under a panchanama. These documents refer to some invoices for the period 2009-2010 to June 2013 along with the copies of balance sheets for the financial years 2009- 2010 to 2012-2013 and Trial Balance Sheets for the years 2013-2014. The show cause notice in paragraph 3 onwards sets out as to what was revealed during the search and from the statement of the sole proprietor Shri Mourya. Then, in paragraph 4, there is a reference made to CENVAT credit register. The documents that were sought from the Petitioner by the Directorate are then referred in paragraph 4 and from paragraph 4.1 the service tax invoices are referred with a specific allegation that these would indicate how the service tax has been recovered but intentionally not deposited in the Government treasury. Then, reference to the payment made in part and how the service tax is leviable in terms of the legal provisions, has been set out. Thus, the demand is based on the allegation that there is a contravention of the legal provision. Admittedly, in this show cause notice, there is reference to several invoices which demonstrate as to how the service tax has been charged from the recipients of the service. Then, there are statements referred to from which the amounts recovered but not remitted to the Government, are set out. Pertinently, all this is after some payment made by the Petitioner. Thus, what we have on record is the demand based on the allegations of breach and intentional violation of the provisions of the Finance Act, 1994 and Chapter-V thereof. It is common ground that on this show cause notice and which was duly served, the Petitioner had filed the reply. It may be that the reply is filed in the month of July 2015 and after the requisite action under Section 87 of the Finance Act but the fact remains that the Petitioner has denied the allegations and refuted the demand. It is in these peculiar circumstances that we are of the opinion that there was no occasion for the authority to have issued the notices under Section 87 to the banks and to the Petitioner's debtor straightaway.

13 Precisely this is a controversy which has been dealt with on several occasions by the Hon'ble Supreme Court and equally by this Court in the case of *Harshad Shantilal Mehta(supra)*. The Hon'ble Supreme Court has held that the amount tax due means ascertained liability for taxes and unascertained and unassessed tax which is not legally binding on the assessee cannot be recovered by the mode found to be applicable in that case. The word 'due' has been interpreted to mean something which is payable and recoverable. The Hon'ble Supreme Court held that it does not refer merely to a liability created by the charging sections to pay the tax under the relevant law. It refers to an ascertained liability for payment of tax quantified in accordance with law. In other words, the taxes as assessed which are presently payable by the notified person are taxes which have been taken into account. It is in that context and carrying this principle further that the Division Bench of this Court applied it to recovery under Section 87 of the Finance Act, 1994. The reliance placed on the judgment of ICICI Bank(supra) is thus, apposite. The Division Bench has applied

this very principle and though Mr Jetly would submit that on facts this judgment is distinguishable, we do not find any substance in that contention. Even in the case of ICICI Bank(supra), it was claimed that a taxable service was provided and that a communication was addressed by the revenue authorities but the payments have been made under protest. There was denial of liability to pay service tax but under duress and coercion, amount was paid. That is how the Petitioner in that case sought guidance from the Central Board of Directorate. A communication dated 25th March, 2015 called upon the Petitioner in that case to make payment of interest for allegedly delaying payment of service tax. The argument of the Petitioner's senior counsel has been noted in paragraphs 6 and 7 of the judgment and it was under similar facts urged that there has to be an adjudication with regard to the liability and once there is such adjudication, then, subject to the legal remedies in law to challenge any adverse order and depending upon the out come thereof, recovery can be initiated. Thus, the settled principle that levy, assessment and valuation alone will enable the Revenue to recover the amount of taxes and recovery cannot precede prior important steps. Merely because there is incidence and charge of tax will not be of assistance as the charging section and machinery provisions all enable together, the Revenue to assess the tax. Unless and until in case before us there is a crystallization of a demand by proper adjudication order and on hearing the Petitioner, there was no question of any recovery. Even if the letters have been addressed to the bank and there has been a freezing of the account, yet, we find that till date there is no adjudication order passed. The show cause notice has been issued more than a year back. In the circumstances, allowing the Petitioner's account to be frozen would not be in accordance with law. Precisely after referring to all cases and similar that too of the Petitioner before us, a Division Bench in ICICI Bank(supra) analyzes provisions of the Finance Act and concludes that there cannot be a recovery. Such a conclusion is reached in para 33 and from para 34 onwards there is a reference made to the provisions enabling recovery of service tax and which are common to those pertaining to excise duty and recovery thereof. It is in these circumstances that the principle laid down by the Hon'ble Supreme Court in

Harshad Mehta's case(supra), has been referred in paragraph 38. Some what identical contentions as raised before us by Mr Jetly have been raised and they are duly noted in paragraphs 39 and 40. Thus, if there is a requirement of an adjudication and assessment of the tax and that is how the liability has to be ascertained then, we do not find any substance in the contentions raised before us on behalf of the Revenue. The Division Bench in paragraph 45 also relied upon the order passed in the case of Lawson Tours and Travels(supra). We, therefore, do not find any reason to sustain the impugned action. We quash and set aside the impugned notices at Annexure-E to the petition on the short ground that these are nothing but recovery measures initiated to recover the amount due as service tax which has not been determined and crystallized pursuant to any adjudication order. Therefore,while quashing these notices, we clarify that we have not expressed any opinion on the rival contentions insofar as the demand is concerned. We have also not held that the Petitioner is liable to pay service tax and on account of some part payment or admission of alleged liability to tax. All pleas in that regard of all sides are kept open. We also clarify that in pursuance of any valid and binding adjudication order the Revenue can initiate all recovery measures including under Section 87 of the Finance Act, 1994. All such steps can be taken irrespective of quashing of subject notices by this order and in this Petition. The Rule is made absolute accordingly but without any order as to costs.

**( B. P. COLABAWALLA, J.)** **(S. C. DHARMADHIKARI, J.)**