THE HON'BLE SRI JUSTICE V. RAMASUBRAMANIAN
AND
THE HON'BLE SRI JUSTICE U. DURGA PRASAD RAO

WRIT PETITION No.16024 of 2016

ORDER: ***(Per VRS,J)***

The General Manager of a Tours & Travels Company, by name, Kesineni Tours & Travels, who also holds a General Power of Attorney from the Proprietor of the Company, has come up with the present writ petition, seeking a Writ of Mandamus to declare the action of the respondents in allegedly compelling, threatening and forcing him to pay service tax without issuing any show-cause-notice, as illegal, arbitrary and unconstitutional and without authority of law.

2. Heard Mr. Avinash Desai, learned counsel for the petitioner, and Mr. Anil Prasad Tiwari, learned special public prosecutor, appearing for the respondents.

3. At the out set, it should be pointed out that the writ petition is filed by the petitioner not on behalf of the Tours & Travels Company, but in his own individual capacity to ward off a threat of arrest. But unfortunately, the prayer, as made in the writ petition, is only for a mandamus to declare the action of the respondents in compelling, threatening and forcing the petitioner to pay service tax without

issuing a show-cause-notice as illegal. Therefore, we are not dealing with the grievance of the Tours & Travels Company in this writ petition, but even according to the learned counsel for the petitioner, we are called upon to decide only the individual grievance of the petitioner as against the threat of arrest, despite the fact that the threat of arrest is not the focus of the prayer made in the writ petition.

4. Admittedly, the petitioner is a General Power of Attorney Holder of the sole proprietor of the Tours & Travels Company. According to him, the Company provides intra and inter-State road transport services, through air-conditioned and non-air-conditioned buses.

5. It appears that the respondents issued summons on 10.02.2016 to the petitioner, alleging evasion of service tax and contravention of the provisions of the Finance Act, 1994 and called upon him to appear before the Senior Intelligence Officer on a date fixed. The summons were issued under Section 14 of the Central Excise Act, 1944 as made applicable to service tax matters under Section 83 of the Finance Act, 1994. It appears that the petitioner appeared on 18.02.2016 and it is claimed by the respondents that a statement was recorded from him. According to the counter affidavit of the respondents, the petitioner left the office of the Senior Intelligence Officer halfway through the

recording of the statement, citing some reasons. However, he again appeared on 22.02.2016 and even thereafter.

6. The petitioner, in the meantime, filed an application in Crl.M.P.No.782 of 2016 on the file of the Special Court for Economic Offences, Hyderabad, under Section 438 of the Code, seeking anticipatory bail. The application was dismissed by the Special Court by an order, dated 24.03.2016, on the ground that there was no reasonable apprehension of being arrested.

7. Thereafter, a communication, dated 29.03.2016, was issued by the Deputy Director to the proprietor of the Tours & Travels Company, informing that the Company *prima facie* appeared to have collected service tax on the bus ticket charges booked both privately and through online-ticketing agents during the period from April, 2015 to February, 2016, but did not remit the same to the Government. The relevant portion of the said communication, dated 29.03.2016, reads as follows:

> *"However, the investigation appears to suggest that M/s. KTT have collected service tax on the bus ticket charges booked on their own as well as through the online ticketing agents (aggregators) during the period April, 2015 to February, 2016, but not paid the same to the Government. It appears that Sri D. Satish Kumar, General Manager (Operations) and General Power of Attorney holder of M/s. KTT has deposed facts contrary to the evidence gathered so far, and he himself appears to have associated with tampering of some of the evidence pertaining to collection*

> *of service tax that was available in the data base. Further, instead of complying with the summons issued by this office for his appearance on 14.03.2016, he has approached the Hon'ble Court of Economic Offences for an anticipatory bail. It is ascertained from the Special Public Prosecutor that Hon'ble Judge of Economic Offences has pronounced the dismissal of the said anticipatory bail application on 24.03.2016. A summon to Shri D. Satish for his appearance on 21.03.2016 has also been returned with the remarks as 'unclaimed'. The case appears to have a serious economic offence bearing on the proprietary firm inasmuch as the service tax appears to have been collected and not paid to the central Government exchequer. The said offence if committed appears to be cognizable under Section 90 of the Finance Act, 1994."*

8. After the issue of the said communication not to the petitioner but to the Proprietor of the Company, the petitioner moved a second application for anticipatory bail before the Special Court in Crl.M.P.No.1169 of 2016, on the ground that his original apprehension had subsequently become a reasonable apprehension with the issue of the communication, dated 29.03.2016. Still, the petitioner was unsuccessful, after the Special Court dismissed the second anticipatory bail application, by an order, dated 29.04.2016.

9. For reasons which we are not able to find out, the petitioner did not challenge the orders of the Special Court, but, he has chosen to move a third anticipatory bail application, though not under Section 438 of the Code, but as a writ petition under Article 226 of the Constitution and that is what is actually before us.

10. The contentions of Mr. Avinash Desai, learned counsel for the petitioner, are two-fold, namely, (a) that the power to arrest, conferred under Section 91 of the Finance Act 1994, cannot be exercised, without even issuing a show-cause-notice and putting the petitioner on notice of the allegations against him, and (b) that similar actions on the part of the Department, in unlawfully extracting money from the assessees under threat of arrest, have been frowned upon by both the Bombay as well as the Delhi High Courts in two different matters.

11. We have carefully considered both the above submissions.

12. At the outset, it should be pointed out that the main allegation, on the basis of which the petitioner went before the Special Court twice for anticipatory bail and has come up before this Court by way of the present writ petition, is that under threat of arrest, the respondents were demanding a sum of Rs.5.00 crores. This assertion made out in Paragraph-10 and elsewhere of the affidavit in support of the writ petition, has been denied by the respondents in their counter affidavit. Therefore, the allegation of demand for payment of Rs.5.00 crores under threat of arrest, remains an oral assertion denied by the respondents. It virtually becomes an oral assertion denied by yet another oral assertion. Therefore, we cannot really go into that question for the present.

13. On the contention revolving around Section 91, it is necessary for us to reproduce Section 91 of the Finance Act 1994, which reads as follows:

> ***"Power to arrest -*** *(1) If the Principal Commissioner or Commissioner, as the case may be, of Central Excise has reason to believe that any person has committed an offence specified in clause (ii) of sub-section (1) of section 89, he may, by general or special order, authorize any officer of Central Excise, not below the rank of Superintendent of Central Excise, to arrest such person.*
>
> *(2) Where a person is arrested for any cognizable offence, every officer authorized to arrest a person shall, inform such person of the grounds of arrest and produce him before a magistrate within twenty-four hours.*
>
> *(3) Omitted by the Finance Act, 2016, w.e.f.14.05.2016.*
>
> *(4) All arrests under this section shall be carried out in accordance with the provisions of the Code of Criminal Procedure, 1973 (2 of 1974) relating to arrests."*

14. Sub-section (1) of Section 91 stipulates that if the Principal Commissioner or Commissioner has reason to believe that any person has committed an offence specified in Section 89(1)(ii) of the Act, he may authorize any officer of the Central Excise, not below the rank of Superintendent of Central Excise, to arrest such person. Sub-Section (2) further stipulates that when a person is arrested for any cognizable offence, every officer authorized to arrest such person shall inform him of all the grounds of arrest and produce him before a Magistrate within 24 hours.

15. In the case on hand, there is not even an order passed by the Principal Commissioner or Commissioner, as contemplated in sub-section (1) of Section 91. All that the petitioner relies upon, is one sentence in Paragraph-3 of the communication, dated 29.03.2016, issued by the Deputy Director, not to the petitioner but to the Proprietor of the Company, of which the petitioner is an employee. Moreover, the communication, dated 29.03.2016, formed the very foundation of the second anticipatory bail application filed by the petitioner before the Special Court. Once the Special Court, which the petitioner approached, rejected the prayer for anticipatory bail, it is not open to the petitioner to indirectly challenge the said order by taking recourse to other grounds and asking for the same prayer but in different terminology. What the petitioner now seeks in this writ petition, is nothing but what he actually sought before the criminal Court, but the present petition is on different grounds under different provisions and in a different language.

16. Insofar as the question of show-cause-notice is concerned, Section 91(1) does not contemplate the issue of any show-cause-notice. The procedure for the issue of a show-cause-notice is for the purpose of adjudication under Section 83A. While the Department has the power to seek adjudication in

terms of Section 83A, the power to arrest and prosecute a person, stands on a completely different footing.

17. Moreover, in the case on hand, the respondents have stated in Paragraph-1(v) of their counter affidavit that on the ground that the petitioner failed to comply with the multiple summons issued to him, a complaint has already been lodged under Section 173 of the Code before the Economic Offences Court in C.C.No.115 of 2016. Thus, the respondents have even started prosecution against the petitioner, on the allegation that he failed to respond to multiple summons. Therefore, at this stage, we do not know how the petitioner contends that Section 91 is not complied with.

18. Coming to the decisions of the Bombay and the Delhi High Courts, it is seen that in those cases, the demand of money under threat of arrest, stood proved by the Department having collected money from them. In this case, the allegation that money was demanded, has been denied by the respondents, in the form of a counter affidavit. In any case, the order of the Delhi High Court appears to have been taken up by the Department to the Supreme Court and the Supreme Court has ordered notice in the Special Leave Petitions.

19. In any case, the case on hand is not comparable to the cases before both the other High Courts. In this case, the petitioner already made an attempt to ward off the arrest, by moving the Special Court twice in the form of anticipatory bail applications. Having lost before the Special Court, the petitioner ought to have taken up the dismissal of his anticipatory bail applications before the appropriate forum. He cannot come back to this Court with a different prayer, but with the objective of achieving the same purpose. Hence, the writ petition is devoid of merits. Therefore, it is dismissed.

Consequently, miscellaneous petitions if any pending in the writ petition shall stand dismissed. No order as to costs.

V. RAMASUBRAMANIAN, J

U. DURGA PRASAD RAO, J.

17th October, 2016
cbs

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