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HIGH COURT OF CHHATTISGARH AT BILASPUR

WRIT PETITION (T) NO. 61 OF 2017

1. M/s S. Kumar's Associates G.S. Compound New Bus Stand, T.P. Nagar. Korba-495677 (C.G.), proprietor Smt. Priya Agrawal, W/o Mr. Sanjay Agrawal, aged about 41 years, resident of G.S. Compound, Transport Nagar, Korba-495677 (C.G.), through its power of attorney holder, Mr. Sanjay Agrawal, S/o Mr. Gaurishankar Agrawal, aged about 43 year's resident of G.S. Compound, Transport Nagar, Korba-495677 (C.G.)
2. Smt. Priya Agrawal, aged about 41 years, w/o Mr. Sanjay Agrawal, resident of G.S. Compound, Transport Nagar, Korba- 495677 (C.G.)

... Petitioners

Versus

1. Additional Commissioner (Preventive), Customs, Central Excise & Service Tax, Bilaspur office of the Commissioner Customs & Central Excise, Bilaspur, Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.)- 492001
2. Commissioner of Customs Central Excise & Service Tax, Bilaspur, office of the Commissioner Customs & Central Excise, Bilaspur, Central Excise Building, Dhamtari Road, Tikrapara, Raipur (C.G.) 492001
3. Union of India, through its Secretary, Ministry of Finance Department of Revenue, North Block (New Delhi) - 11001

... Respondents

For Petitioners	:	Mr. Siddharth Dubey, Advocate.
For Respondents	:	Mr. Vinay Pandey, Advocate.

Hon'ble Shri Justice P. Sam Koshy

Order on Board

21/07/2017

1. By way of the present petition under Article 226 of the Constitution of India, the Petitioners have sought for issuance of a writ quashing Annexure P-1, dated 16.12.2016, passed by Respondent No.1-Additional Commissioner (Preventive), whereby a letter has been issued to the management of South Eastern Coalfields Limited (SECL) requesting the SECL authorities to freeze the amount payable to the petitioner-establishment. Similarly, the challenge is also to Annexure P-2, dated 16.12.2016, which is a similar letter issued to the Union Bank of India, i.e., one of the Bankers of the petitioner-establishment. Annexure P-3, dated 21.10.2016, is a show cause notice which is also under challenge.

2. On the basis of the discussions referred to in the show cause notice (Annexure P-3) it was assumed that the Petitioners have failed to correctly assess and pay service tax within stipulated period and that they have also failed to submit ST-3 return and have also failed to show the correct taxable amount in ST-3 return for the period 2011-12 to 2015-16.

3. The solitary ground of challenge by the Petitioners to these impugned orders is that there has been no determination made by the Respondents assessing the actual amount of default on the part of the petitioner-establishment upon which the recovery proceedings could have been initiated. Learned Counsel for the Petitioners refers to the provisions of Sections 72, 73 and 87 of the Finance Act and submits that until and unless there is a determination made by the Respondents, no recovery proceedings could have been initiated. According to the Counsel for the Petitioners, Annexure P-3 which is also under challenge in the present writ petition is nothing but a show cause notice. That, the show cause notice must be proceeded with and acted upon resulting in a determination of an assessment of service tax, that has not been levied or short levied or short paid or erroneously refunded. In the absence of any such adjudication or determination, no recovery proceeding could have initiated and therefore the two letters issued by the Respondents, i.e., Annexures P-1 and P-2, one to the management of SECL and second to the Union Bank of India are bad in law and not sustainable and deserve quashment.

4. Learned Counsel for the Respondents however submits that it is only at the stage of show cause notice and nothing prevents the Petitioners from submitting a detailed reply and contest their case before the authorities and the writ petition at this juncture in its present form may not be maintainable and the same deserves to be rejected in the light of the judgment passed by this Court in the case of *M/s Sarda Energy &*

Minerals Ltd. v. Union of India & Another, decided on 28.6.2017 in Writ Petition (T) No. 73 of 2017.

5. Per contra, learned Counsel for the Petitioners submits that the letters (Annexures P-1 and P-2) also reflect that they have been issued invoking the powers conferred upon the authorities under Section 87 of the Act. Proceedings under Section 87 could have been initiated only on determination being done under sub-Section 2 of Section 73. In the instant case, there does not appear to be any such proceeding drawn or determination made and thus prayed for the quashment of the same.

6. Having heard the contentions put forth on either side, it would be relevant to take note of a couple of judgments of different High Courts in this regard. The Karnataka High Court in the case of *Mrs. Prashanthi v. The Union of India & Others*, decided on 29.4.2015 in Writ Petition No. 14054 of 2015 (T-TAR), in paragraphs 18 and 19 has held as under:

“18. Regard being had to the scheme of the Finance Act, 1994 it does not leave any doubt in the mind of this court that until and unless there is no determination and adjudication either under Section 72 or under Section 73 of the Act, respondents-2 to 4 cannot resort to invoke Section 87 of the Finance Act. When there is no adjudication order and undisputedly and concededly in the instant case, respondent No.4 having issued a show cause notice to the service provider M/s Rapid Marine Suppliers as contemplated under Section 73(1) of the Act for adjudicating the show cause notice by calling upon the service provider to show cause as to why the amounts as indicated in the show cause notice should not be recovered from it, has simultaneously proceeded to issue recovery notice to respondents 6 and 7 by calling upon them to remit the amounts held by them on behalf of the service provider.

19. ...This Court is of the considered view that power vested under Section 87(b)(i) & (ii) of the Finance Act, 1994 can be exercised only after adjudication of the show cause notice is concluded. In other words, resort to Section 87 of the Finance Act, 1994 can be had for recovering the amounts determined to be due from the service provider and not prior to that...”

7. Likewise, the Gujarat High Court in the matter of *Gopala Builders v. Directorate General of Central Excise Intelligence*, decided on 1.10.2015 in

Special Civil Application No. 8704 of 2015, in paragraph 10, 11 & 12, has held as follows:

“10. From the facts noted hereinabove, it is evident that the proceedings initiated against the petitioner, post the search operations, are still at the stage of show cause notice. Therefore, there is no final adjudication in respect of the service tax liability of the petitioner. The respondents, however, have unilaterally worked out such liability for the period in question at Rs. 4,25,74,611/-. Thereafter, no demand for such amount has been made from the petitioner by issuing any demand notice in this regard. However, the respondents have resorted to the drastic measure of issuing notices under Section 87 of the Act to the debtors of the petitioner. Section 87 of the Finance Act, 1994 provides for recovery of any amount due to Central Government and lays down that where any amount payable by a person to the credit of the Central Government under any of the provisions of that Chapter or the rules made thereunder is not paid, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned therein. Section 87 of the Finance Act, 1994 came up for consideration before the Jharkhand High Court in the case of **Exam Security Services Pvt. Ltd. v. Union of India**, 2015 SCC Online Jhar 350, wherein the Court reiterated the view expressed by the Uttarakhand High Court in the case of **R.V. Man Power Solution v. Commissioner of Customs and Central Excise**, (2014) 69 VST 528, wherein it has been observed that going by the language of section 87 of the Finance Act, any amount payable means the amount adjudicated after hearing the show cause notice and this provision of Section 87 is one of the methods of recovery of the amount due and payable after adjudication is done. Such claim can be made only when the final adjudication has been done after quantifying the amount due and payable by the assessee.

11. This Court is in agreement with the aforesaid view expressed by the Uttarakhand High Court, namely, that recovery under Section 87 of the Finance Act can be resorted to only after an amount is adjudicated to be due to the Central Government. Under the circumstances, at the stage of show cause notice when the liability of the petitioner is yet to be crystallized, it was not permissible for the respondents to resort to the drastic provisions of section 87 of the Act.

12. Besides, as the facts reveal, no demand notice in respect of the aforesaid amount had been issued to the petitioner and directly garnishee orders had been issued to the clients of the petitioner. Such course of action adopted by the respondents, evidently, would bring the petitioner to disrepute and spoil its reputation in the business. Therefore, the action of the respondents of resorting to the provisions of section 87 of the Act was not warranted in the facts and circumstances of the case. The impugned notices, Annexure “E” collectively to the petition, being contrary to the provisions of section 87 of the Act, therefore, cannot be sustained.”

8. Further, in the case of *ICICI Bank Limited v. The Union of India & Others*, 2015 SCC Online Bom 4875, the Division Bench of the Bombay High Court has held as under:

“**44.** We are of the considered view that the amount which is payable by a person can be said to be payable only after, there is determination as provided under Section 72 or Section 73 of the said Act. We find that neither of that has been done.”

9. On perusal of the aforesaid judicial pronouncements, it would be evidently clear that before initiating proceeding under Section 87, the authorities ought to have initiated appropriate assessment proceeding and determination of the amount payable by the establishment and a demand notice also needs to be issued and only in the event of the demand notice not being satisfied, the proceedings under Section 87 can be initiated. In the instant case, when we look at the reply submitted by the Respondents, we do not find any such adjudication done under Section 73 of the Act. Neither from the reply nor from the submissions made by the Respondents, do we find any demand notice being raised against the Petitioners at any point of time and it is only the garnishee notices and a freezing order straightaway issued, Annexure P-1 to the management of SECL and Annexure P-2 to the Union Bank of India.

10. For the foregoing reasons, this Court has no hesitation in reaching to the conclusion that the garnishee notices issued to the SECL and Union Bank of India were totally uncalled for and the authorities ought not to have issued such notices before a final determination is done. Thus, Annexures P-1 and P-2 at this juncture deserve to be and are set aside/quashed. Since the Petitioners submit that to the show cause notice, dated 21.10.2016, they have now filed a detailed reply on 12.5.2017 and since no adjudication has been done, it is expected that the Respondents shall finalize the proceeding drawn on the show cause notice dated 21.10.2016

and thereafter determine the amount payable by the Petitioners and then issue appropriate demand notice in accordance with law applicable and only in the event of a failure to satisfy the demand notice, should the Respondents initiate the proceeding under Section 87 of the Act. Thus, the two orders, Annexures P-1 and P-2, as a consequence get quashed.

11. The present writ petition is allowed and disposed off. No order as to costs.

Sd/-
(P. Sam Koshy)
Judge

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