IN THE HIGH COURT OF JUDICATURE AT PATNA

Criminal Miscellaneous No.6207 of 2012

Arising Out of PS.Case No. -0 Year- null Thana -null District- PATNA

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Santosh Kumar Jha, son of Bhagwanlal Jha, resident of Jagat Narain Road, P.O. & P.S.- Kadamkuan, District- Patna

.... Petitioner/s

Versus

1. The State of Bihar
2. The Additional Collector, Disaster Management , Patna

.... Opposite Party/s

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Appearance :

For the Petitioner/s : Mr. Suraj Samdarshi, Advocate

For the Opposite Party/s : Mr. Jharkhandi Upadhyay, APP

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CORAM: HONOURABLE MR. JUSTICE SANJAY PRIYA

CAV JUDGMENT

Date: 31-01-2018

1. This application under Section 482 of the Code of Criminal Procedure has been filed for quashing the order dated 09.01.2012 passed by the Chief Judicial Magistrate, Patna, in Government Complaint Case No.90-C of 2012, by which learned Magistrate after holding enquiry has found *prima facie* case against the petitioner for the offence under Section(s) 420, 406 Indian Penal Code.

2. As per the Complaint Petition filed by the Collector, Disaster Management, Patna, in the year 2004, vast area of the State of Bihar was flood affected as a result of which the government undertook immediate relief work in the affected area and invited tender from interested person/institution on 19.06.2004.

The accused was also one of the tenderer in his name as well as in fictitious name. The tender submitted by M/s BSSI Corporation Ltd. (M/s Baba Satya Sai Enterprises) was accepted. The evidence gathered by the Vigilance Department shows that agreement paper submitted by BSSI Corporation Ltd. was tampered by the accused. The accused (petitioner) was chosen to supply relief materials. This petitioner obtained Rs.17.80 crores on various dates against the name of supply of materials to the flood affected areas in collusion with Officers and staff of Disaster Management Office, Patna. The petitioner has admitted having received Rs.17.80 crorers. The petitioner was duty bound to pay income tax at source on every payment that he received. It is well settled that income tax has to be paid at source itself on every payment to the government fund. The petitioner after inducing and managing officials and staff of the Disaster Management Office, Patna, with intention to cheat the government and deny payment of income tax with malafide intention received the payment without deducting income tax at source with categorical promise to settle and pay the tax on completion of relief work.

3. Authorities of the Complainant's office after the relief work asked the accused to pay income tax, but he deferred payment contrary to his promise on one pretext or the other and did not make payment of the same even on repeated request by the authorities as well the witnesses of this Complaint Case. The income tax payable on Rs.17.80 crores was calculated to Rs.45,05,536/-. The income tax department, ultimately, attached the account of the Complainant being no.10331745852 and recovered the tax amount along with surcharges of Rs.45,05,536/- for not making payment of tax in time. This Complainant served legal notice to the accused calling upon him to pay the tax amount, but the petitioner did not make payment and gave evasive reply although he admitted to have received Rs.17.80 crores from the office of the Complainant. The Complainant has alleged that this petitioner has caused wrongful loss to the Complainant and caused wrongful gain to himself and has misappropriated more than Rs.45,05,536/- and is liable for the offence punishable under Section 406, 420 Indian Penal Code.

4. The Court after holding enquiry on the Complaint Petition has found *prima facie* case against the accused petitioner for the offence under Section(s) 406, 420 Indian Penal Code.

5. Learned counsel for the petitioner has submitted that in terms of Section 194-C of the Income Tax Act, onus and responsibility for payment of tax is not on the Contractor. It is the onus and responsibility of the person making payment to deduct the tax at source. Instant criminal case is abuse of process of law. The Complainant, and the District Magistrate preferred Misc. Appeal No.260 of 2008 in this Hon'ble Court against the coercive action taken by the Deputy Commissioner of Income Tax, TDS Circle, Patna, in recovering the amount of Rs.45,05,536/- being the amount of tax deductible at source and the interest thereon. Aforesaid Misc. Appeal was disposed off as not maintainable in absence of substantial question of law raised in the appeal by judgment dated 20th January, 2011. Thereafter, instant criminal case has been instituted by the Complainant. It has been submitted that the Complainant has also filed requisition for initiation of a certificate proceeding for recovery of the amount, which was paid by the District Administration as tax amount to the Income Tax Department.

6. Counsel for the petitioner has relied on the judgment of the Supreme Court in the case of ***Rajeswar Tiwari vs. Nanda Kishore Roy*** reported in ***(2010) 8 Supreme Court Cases 442*** in support of his submission.

7. Counsel for the State has submitted that the petitioner admits about receipt of Rs.17.80 crores from the government on various dates against the name of supply of materials to the flood affected areas. The tax at source was not paid to the Income Tax Department. The petitioner managed to receive payment on the promise that he will settle and pay the amount of tax on completion of relief work. But the petitioner deferred the payment on one pretext or the other and did not make payment of the same in spite of repeated request. Thereafter, Income Tax Department attached the account of the Complainant and recovered tax amount including surcharge of Rs.45,05,536/- for not making payment of tax in time. Aforesaid act of the petitioner was done with intention to cause wrongful loss to the government and wrongful gain to himself and, thus, he misappropriated Rs.45,05,536/-.

8. From the averments made in the Complaint Petition, it appears that it is admitted position that the petitioner was chosen by tender to supply relief material in 2004 in the flood affected areas. It is also admitted position from the complaint that income tax at source was not paid to the Income Tax Department. The petitioner received the payment against the name of supply of materials to the flood affected areas amounting to Rs.17.80 crores, without making payment of income tax. It is also admitted fact that Income Tax Department attached the account of the Complainant being no.10331745852 and recovered the tax amount of Rs.45,05,536/- along with surcharge for not making payment of tax in time by the petitioner.

9. It is alleged in the Complaint Petition that the petitioner always deferred payment of income tax contrary to his promise on one pretext or other and, ultimately, did not make payment of the aforesaid amount even on repeated request by the authorities as well as witnesses of the Complaint Case.

10. Section 194-C of the Income Tax Act, 1961, lays down as follows:

> "194C.Payments to contractors.—
>
> (1) Any person responsible for paying any sum to any resident (hereafter in this section referred to as the contractor) for carrying out any work (including supply of labour for carrying out any work) in pursuance of a contract between the contractor and a specified person shall, at the time of credit of such sum to the account of the Contractor or at the time of payment thereof in cash or by issue of a cheque or draft or by any other mode, whichever is earlier, deduct an amount equal to—
> (i) one per cent where the payment is being made or credit is being given to an individual or a Hindu undivided family;
> (ii) two percent where the payment is being made or credit is being given to a person other than an individual or a Hindu undivided family,
> of such sum as income-tax on income comprised therein.
> (2) Where any sum referred to in sub-section (1) is credited to any account, whether called "Suspense account" or by any other name, in the books of account of the person liable to pay such income, such crediting shall be deemed to be credit of such income to the account of the payee and the provisions of this section shall apply accordingly.
> (3) Where any sum is paid or credited for carrying out any work mentioned in sub-clause (e) of clause (iv) of the Explanation, tax shall be deducted at source—
> (i) on the invoice value excluding the value of

> material, if such value is mentioned separately in the invoice; or
> (ii) on the whole of the invoice value, if the value of material is not mentioned separately in the invoice.
> (4) No individual or Hindu undivided family shall be liable to deduct income-tax on the sum credited or paid to the account of the contractor where such sum is credited or paid exclusively for personal purposes of such individual or any member of Hindu undivided family.
> (5) No deduction shall be made from the amount of any sum credited or paid or likely to be credited or paid to the account of, or to, the contractor, if such sum does not exceed [thirty thousand rupees]:
> Provided that where the aggregate of the amounts of such sums credited or paid or likely to be credited or paid during the financial year exceeds [one lakh rupees], the person responsible for paying such sums referred to in sub-section (1) shall be liable to deduct income-tax under this Section.
> (6) No deduction shall be made from any sum credited or paid or likely to be credited or paid during the previous year to the account of a contractor during the course of business of plying, hiring or leasing goods carriages, [where such contractor owns ten or less goods carriages at any time during the previous year and furnishes a declaration to that effect along with] his Permanent Account Number, to the person paying or crediting such sum.
> (7) The person responsible for paying or crediting any sum to the person referred to in sub-section (6) shall furnish, to the prescribed income-tax authority or the person authorized by it, such particulars, in such form and within such time as may be prescribed."

Explanation (i) of this Section mentions "specified person", in detail, and in sub clause (l) it is included "any person, being an individual or a Hindu undivided family or an association of persons or a body of individuals, if such person,---

> (A) does not fall under any of the preceding sub-clauses; and
> (B) is liable to audit of account under clause (a)

or clause (b) of Section 44 AB during the financial year immediately preceding the financial year in which such sum is credited or paid to the account of the contractor.

11. From the judgment dated 20.01.2011 of this Court passed in Misc. Appeal No.260 of 2008, it is apparent that amount of Rs.45,05,536/- being amount of tax deductible at source and interest thereon was recovered by the Income Tax Department after attaching account of the Complainant being no.10331745852 for not making payment of tax in time by the petitioner. The Complainant served legal notice on the petitioner and called upon the petitioner to pay back the tax amount to the Complainant's office or to deposit the tax amount obtained by the Income Tax Department, in the account of the Complainant but the accused did not make payment and gave evasive reply although he has admitted to have received Rs.17.80 crores from the office of the Complainant.

12. In such circumstances, from the conduct of the petitioner, this Court is of the view that this petitioner has caused wrongful loss to the office of the Complainant and wrongful gain to himself by not making payment of tax amount to the Income Tax Department on the payments received by him from the government on various dates against the name of supply of materials to the flood affected areas within time and has misappropriated the same.

13. The Court below on the basis of the allegations made in the official complaint filed by the Complainant has found *prima facie* case against the petitioner for the offence under Section(s) 406 and 420 Indian Penal Code.

14. From the allegation made in the complaint, this Court finds that there are ingredients for the offence under Section(s) 406, 420 Indian Penal Code against the accused person. It further appears from Annexure-5 that the Complainant has filed requisition for initiating certificate proceeding for recovery of tax amount, which was to be recovered from the petitioner to be paid to the Complainant towards dues to income tax amount payable by this petitioner for not making such payment of tax in time by this petitioner. The petitioner, in spite of serving of legal notice by the Complainant, did not make payment and gave evasive reply although he admitted to have received the payment of Rs.17.80 crores from the office of the Complainant.

15. The petitioner during pendency of this application in this Hon'ble Court at no point of time has contradicted of having received Rs.17.80 crores from the office of the Complainant on various dates against the name of supply of materials to the flood affected areas.

16. Therefore, this Court does not find any illegality in the impugned order dated 09.01.2012 passed by the Chief Judicial Magistrate, Patna, in Government Complaint Case No.90-C of 2012, by which the learned Magistrate has found *prima facie* case against the petitioner for the offence under Section(s) 406, 420 Indian Penal Code.

17. This application is, accordingly, **dismissed**.

18. The petitioner is given liberty to raise all the points, as raised in the present application, at the time of framing of Charge, which shall be considered and disposed off by the learned Court below in accordance with law without being prejudiced by this order.

(Sanjay Priya, J)

J.Alam/-

AFR/NAFR	**NAFR**
CAV DATE	**21-12-2017**
Uploading Date	**03-02-2018**
Transmission Date	**03-02-2018**