IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

CRIMINAL WRIT PETITION NO. 2143 OF 2018

Yashovardhan Birla … Petitioner
Vs.
Assistant Director of Income
Tax (Inv.) & Anr. … Respondents.

…

Mr. Haresh Jagtiani, Sr. Counsel a/w Mr. Siddhesh Bhole a/w Mr. Rayden Fernandes and Nilhil Ghate I/b Mr. Haresh Jagtiani and Associates for Petitioner.
Mr. A.C. Singh, Additional Solicitor General a/w Mr. Suresh Kumar & Geetika Gandhi for the Respondent No.1.
Mr. P.H. Gaikwad and Mrs. N.S. Jain, APP for the Respondent-State.

…

CORAM : PRAKASH D. NAIK, J.
DATE : 05th JULY, 2018.

P.C.

1. Heard both sides for final disposal.

2. The petitioner has invoked jurisdiction of this Court under Article 227 of Constitution of India as well as to inherent powers under Section 482 of Code of Criminal Procedure challenging the order dated 12th April, 2018 passed by the Court of Additional Chief Metropolitan Magistrate 38th Court, Ballard Pier, Mumbai as well as the Letter of Request dated 13th April, 2018 in CC 192/SW/15.

3. The brief facts which are necessary to adjudicate the issue involved in this matter are as follows:-

(a) Complaint was filed by the respondent No.1 in the Court of learned 38th Additional Chief Metropolitan Magistrate's Court, Ballard Pier, Mumbai on 4th September, 2015 alleging offences under Section 277 of Income Tax Act,1961, Sections 181, 186, 191 read with Section 193 of Indian penal Code. Learned Magistrate has taken cognizance of the said complaint and the same is pending in the said Court. The petitioner has been impleaded as accused in the said complaint. The petitioner appeared before the trial Court and furnished bail bond.

(b) Petitioner filed Writ Petitions bearing Nos. 1208 of 2016, 1209 of 2016, 1210 of 2016, 1211 of 2016, 1212 of 2016, 1213 of 16, 1324 of 2016 and 1326 of 2016 in this Court seeking directions to Income Tax Settlement Commission who had rejected the application of petitioner dated 30th March, 2016 for settling his cases for assessment years 1998-99 to 2014-15 vide order dated 12th April, 2016. This Court by order dated 3rd August, 2016 and 10th August, 2016 set aside order dated 12th April, 2016 passed by Income Tax Settlement Commission and Order dated 30th March, 2016 passed by Assessing Officer, thereby restoring application of settlement on the file of Commissioner. The petitioner filed stay application dated 18th July, 2016 and 19th September, 2016 before the trial Court, on the ground that the order of Settlement Commission would have directed bearing on the complaint. The respondent opposed the application by filing reply on 18th December, 2017. Application was adjourned to 12th February, 2018.

(c) Since the application seeking settlement was rejected on 27th September, 2017. The said order was challenged by preferring Writ Petition No. 862 of 2018. The Writ Petition was heard by this Court and interim order was passed on 6th April 2018 granting stay ad-interim against assessing officer proceeding further with scheduled dated of 12th April, 2018 for conducting assessment. The order of stay was thereafter extended on 20th April, 2018.

(d) On 12th February, 2018, the proceedings pending before the trial Court were adjourned to 2nd July, 2018. The learned Magistrate was on leave. On 9th April, 2018, the respondent preferred an application before the Court of learned Magistrate for taking the matter on board vide Exh.15. In view of the request, the trial Court was pleased to take the matter on board and on the same day application vide Exh.16 was filed before the learned Magistrate under Section 166-A of the Code of Criminal Procedure. The application was put up for hearing on 12th April, 2018.

(e) On 12th April, 2018, the advocate for the department was heard and the learned Magistrate was pleased to pass order on the said application. The learned Magistrate directed issuance of Letter of Request requesting Foreign Country Government of Bailiwick of Guernsey to make investigation in this particular account of accused and to submit that report to Court as early as possible.

(f) On 13th April,2018, the respondent No.1 moved the court for taking the matter on board by preferring application Exh.17. In the application Exh.17, it was stated that in view of order dated 12th April, 2018, there is urgency to send a proforma to Minister of Home Affairs India at the earliest. The Court then proceeded to pass the order of Letter of Request in the form annexed to the petition. Subsequently, the petitioner learnt about the orders passed by the learned Magistrate and hence preferred present petition challenging the said order.

4. It is submitted by the counsel for the petitioner that the

impugned orders were passed without affording any opportunity to the petitioner. It is submitted that the proceeding before the trial Court would due for hearing on 2nd July, 2018. However, the respondent No.1 had taken the matter on board on 9th April, 2018 and thereafter the order was passed on 12th April, 2018 which was followed by order dated 13th April, 2018. It is submitted that the proceedings are pending in the trial Court since 2015 and all of a sudden, the application was preferred before the trial Court behind the back of the petitioner wherein the said order was passed. The trial Court has erred in mechanically passing impugned order dated 12th April, 2018 and issuing impugned Letter of Request dated 13th April, 2018. No notice was given to petitioner or his advocate by respondent. The Court has exceeded jurisdiction under Section 166A of Code of Criminal Procedure and Section 105 of Code of Criminal Procedure. It was necessary to follow provisions envisaged under Section 105 C to 105 J of Code of Criminal Procedure. The said provisions contemplate issuance of show cause notice as to why the properties should not be attached. The Writ Petition No. 862 of 2018 is pending in High Court wherein the relief sought have bearing on maintainability of complaint, in which impugned order was passed. The outcome of

Settlement Commission would have direct bearing on the complaint. It is submitted that by stating that huge amount is lying in the said account in foreign country respondent has tried to cause prejudice in the mind of Court. It is submitted that the application preferred by the Respondent No.1 also mentions in paragraph 16 that Income Tax Department through International Legal Assistant intends to restrain the accused from transferring funds and winding up of the entities, based in the Bailiwick of Guernsey as it appears that the assets of said entities on which the accused is beneficial owner are proceeds of crime. He further pointed out that in the application, the respondents have prayed for issuance of Letter of Request and Letter of Rogatory to the relevant foreign court to issue an attachment order in respect of said entities and also sought restrain order restraining transfer of funds from the said entities. It is thus submitted that considering the averments made in the application and the reliefs sought therein the Court ought not to have passed the said orders without giving an opportunity of hearing to the petitioner. It is submitted that apart from the violation of principle of nature justice, even on merits as the order was not warranted. It is submitted that the powers under Section 166-A of Code of Criminal Procedure cannot be exercised in a private complaint which was pending before the Court. It is therefore submitted that the impugned orders be set aside.

5. Mr. Anil Singh, learned Additional Solicitor General submitted that the complaint was filed invoking Section 277 of Income Tax Act 1966 and Section 181, 186, 191 read with 193 of IPC. It is submitted that for initiating any proceedings under Section 166-A of Code of Criminal Procedure, there is no necessity of giving any notice to the persons against whom such action is initiated. It is submitted that it is prerogative of the investigating agency to seek of investigation contemplated under Section 166-A of Code of Criminal Procedure. It is submitted that an application was preferred only under Section 166-A of Code of Criminal Procedure which do not require issuance of show cause notice to the person against whom the relief are sought. It is submitted that in the application itself it was stated that there is sufficient evidence collected by the investigating agency with regards to the amounts in the said country in relation to the entities in which the petitioner is the beneficiary and therefore the trial Court has rightly passed said orders. It is submitted that there is no violation of principle of natural justice. The trial Court is empowered to

pass such order. He relied upon the decision in the case of *Union of India and another -Vs- W.N.Chadha*[1], in support of his opportunity submission that of hearing was not required to be given for invoking provisions of Section 166 A of Code of Criminal Procedure. It is submitted that from the title of the application preferred before the trial Court it is clear that the relief was sought only under Section 166-A of Code of Criminal Procedure and not under Section 105-C. It is submitted that for the reasons stated in the application and the reasons assigned by the Court while allowing the application, the interference of this Court is not called for. The investigation is required to be conducted expeditiously so that amount lying in the account is not transferred and therefore in the interest of justice it was necessary to seek such reliefs from the Court. It is submitted that investigation contemplated under Section 166-A of Code of Criminal Procedure can be sought by preferring application in the complaint. Such investigation was sought within the purview of the definition of investigation enumerated in the Code of Criminal Procedure. It is thus submitted that the petition is devoid of merits and the same deserves to be dismissed.

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1 1993 Supp (4) Supreme Court Cases 260.

6. Having considered the rival submissions and perusal of the documents on record it is apparent that the complaint was filed by the respondent before the competent court invoking the provisions of the Income Tax Act as well as Indian Penal Code in the year 2015 which is pending in the said Court. It appears that the respondent had gathered some information as stipulated in the complaint before the trial Court with regards to the account in the entities mentioned therein and therefore it was felt necessary to prefer an application. However, on perusal of the Roznama, it is crystal clear that the complaint was listed before the Court on 12th February, 2018 and since the Court was on leave, the board was discharged and the proceedings were adjourned to 2nd July, 2018. In the circumstances, there was no occasion for the petitioner to appear before the trial Court on 9th April, 2018, 12th April, 2018 or 13th April, 2018. The impugned order passed by the trial Court proceeds on the basis that the accused and his advocate are found absent when repeatedly called out. It appears that the Court was under belief that the matter was due for hearing on that day or that they were put to notice and in spite of that neither the advocate nor the accused were present in the Court when the applications was heard by the Court. It is seen that the application

Exh.15 was moved before Court for taking the matter on board on 9th April, 2018. It was stated that the complainant intends to file an application under Section 166 A read with 105 C of Code of Criminal Procedure for issuing Letter of Request to the competent authority for investigation. The said application was allowed and matter was taken on board. The application vide Exh.16 seeking the reliefs stated hereinabove was taken on record and the same was posted for hearing on 12th April, 2018. While passing impugned order, the Court was pleased to observe that on perusal of record it is found that the complainant has mentioned regarding the accounts maintained by the accused in the foreign country i.e Government of Bailiwick of Guernsey. It is further observed that in the said account there is huge amount of Rs.400 crorers and there is apprehension that accused would transfer the said amount from the account to any other country. Hence, it is necessary to issue letter of request that the Government of Bailiwick of Guernsey to investigate and to collect the evidence or material in respect of the account maintained by the accused in the said country and to examine orally any person supposed to be acquainted with the facts and circumstances of the case and to record his statement made in the course of such examination and also require such person or any other person to produce any document or thing which may be in his possession pertaining to the case and the alleged account of accused and forward all evidence so collected to the Court. The Court issued such Letter of Request calling for report as early as possible.

7. The application preferred by the respondent No.1 gives details about said entities. It is prayed in the application that the Letter of Request and Letter of Rogatory be issued to the Foreign Court to place restraint order restraining transfer of funds from the entities viz Banyan Tree Trust and Kinetic Holding Limited. The applicant further prayed that the Letter of Request or Letter of Rogatory be issued to the relevant foreign court to place a restraint order on Confiance Limited restraining it from executing fund asset transfer away from entities stated therein. It was further prayed that Court may issue Letter of Request / Letter of Rogatory to relevant foreign Court to issue attachment order in respect of entitles though not based in Guernsey but managed from that Country by Confiance Limited. It is also pertinent to note that in the application it is mentioned the Income Tax Department through International legal assistance intends to restrain the accused from transferring funds and winding up of entities based

in that country as it appears that the assets of said entities of which the accused is beneficial owner are proceeds of crime. On perusal of the letter, it can be seen that the assistance is sought from the foreign country with regards to restraint order as well as the attachment order. The letter also refers to Section 105-C of Code of Criminal Procedure which relates to assistance in relation to orders of attachment or forfeiture of property. In the case of Union of India Vs. W.N.Chadha(Supra) the petitioner had challenged the order passed by High Court knocking down the very registration of FIR and all proceedings arising thereon including issue of Letter of Rogatory. The contention of respondent before the High Court was that FIR does not disclose commission of offence and Letters of Rogatory were issued without jurisdiction and without following principle of natural justice. The submission was accepted by High Court that there was violation of principle of natural justice. It is apparent that the letter of Rogatory was issued under Section 166-A of Code of Criminal Procedure. The steps to issue such letter were adopted when investigation in pursuant to registration of FIR was in progress. The Hon'ble Supreme Court observed that rule of *audi alteram partem* is not attracted for investigation under Section 166A of

Code of Criminal Procedure. The investigating officer is not deciding any matter except collecting material for ascertaining whether a *prima-facie* case is made out or not and a full enquiry in case of filing report under Section 173(2) of Code of Criminal Procedure follows in a trial before the Court or Tribunal before filing report and at that stage rule of *audi alteram partem* cannot be applied.

8. In the present case, the proceedings were pending before the competent court, the matter was adjourned to 2nd July, 2018 and the application was preferred on 9th April, 2018 by taking matter on board. The nature of prayers made in the application are highlighted above. It is also alleged that the assets of which petitioner is owner are proceeds of crime. Letter of Request refers to invoking Section 105 C of Code of Criminal Procedure. The Letter of Request also refers to restraint order and attachment order. In the circumstances stated hereinabove, it was expected that the trial Court ought to have given an opportunity to the Petitioner. However, one cannot ignore the purport of preferring the application and apprehension expressed therein. In the circumstances, the balance will have to be struck between the principle of natural justice and need for investigation into aspects

as claimed in the application preferred by the respondents. In the circumstances, I pass the following order.

ORDER

(i) Writ Petition is allowed partly allowed.

(ii) Impugned order dated 12th April, 2018 and order issuing Letter of Request dated 13th April, 2018 are hereby set aside. The matter is remanded back to the trial Court for hearing the application preferred by the respondent afresh. The petitioner be afforded an opportunity of hearing the application preferred by the respondent no.1.

(iii) In the meantime, without prejudice to the rights / objections of both the parties and subject to the decision of the trial court in the application preferred by the respondent No.1, the amount in the entities which is subject matter of the application preferred by the respondent no.1 may not be transferred to any other account;

(iv) All points raised in this petition are kept open;

(v) It is clarified that this Court has not made any observations on merits of the case and the trial Court shall decide the proceedings in accordance with law;

(vi) The parties through their counsel to appear before the trial Court on 1st August, 2018. The application be decided expeditiously;

(vi) Petition stands disposed of.

Sachidanand Kuttan Nair
Digitally signed by Sachidanand Kuttan Nair
Date: 2018.07.17 19:36:48 +0530

(PRAKASH D. NAIK, J.)