

SMT JUSTICE T. RAJANI

CRIMINAL PETITION Nos.2283 and 2285 of 2018

COMMON ORDER:

The condition, that the petitioners shall furnish bank guarantee for the remaining due amount, within ten days from the date of order of the Court below, imposed, while granting bail to the petitioners, is what is brought into question in the present criminal petitions.

2. Heard the counsel for the petitioners and Mr. Anil Prasad Tiwari, Special Public Prosecutor appearing for the respondent.

3. The facts of the case need to be briefly stated, in order to decide, to sustain or not to sustain the aforesaid condition:

The petitioners were engaged in providing taxable services in assisting the prospective customers in process of loans from different banks and financial institutions. The banks gave certain amount as consideration to the petitioners under the head 'Commission' and these amounts were received for rendering the said services, which are liable to service tax. Information was received by DGGSTI, Hyderabad, which suggested that the petitioners collected the service tax from the service recipients and did not pay the same to the credit of the Central Government. Accordingly, investigation was initiated against the petitioners.

The scrutiny of the documents, recovered from the petitioners, revealed that the petitioners received consideration, along with service tax thereon, from the service recipients, during the period October 2012 to March 2017. The petitioners collected service tax to a tune of

Rs.4,05,77,984/- and Rs.2,16,89,832/- respectively from different service recipients but did not pay the same to the credit of the Central Government. Party verification was also done, which indicated that service consideration was paid by the recipients, inclusive of service tax. Hence, the petitioners were held liable for the offence under Section 89 of the Finance Act, 1994 (for short 'the Act').

4. Section 89(d) of the Act mandates that any amount collected as service tax should be credited to the Central Government, within a period of six months from the date on which such payment becomes due.

5. The petitioners moved the Court of Special Judge for Economic Offences, Hyderabad by way of CRLMP.Nos.609 and 608 of 2018, respectively, seeking bail. But the Court below, while ordering bail, imposed the impugned condition, of furnishing bank guarantee for the remaining amount, after part payment made by the petitioners.

6. Section 73A(3) of the Act requires the Central Excise Officer, to serve notice, requiring the person liable to pay the amount, to show cause as to why the said amount should not be paid by him, to the credit of the Central Government. Clause (4) of the said provision, requires the Central Excise Officer, to consider the representation, if any, made by the person on whom the said notice is served and determine the amount due from the said person, not being in excess of the amount specified in the notice.

7. The counsel for the petitioners contends, that the aforesaid conditions were not fulfilled by the prosecution and unless those

conditions are fulfilled, the due time for payment of the tax does not arise and hence, the payment does not become due, in order to invoke Section 89 of the Act.

8. The Special Public Prosecutor does not refute the submission of the counsel for the petitioners, that no such notice was served. The Special Public Prosecutor filed a counter affidavit contending, firstly, that the time given for furnishing the bank guarantee has expired by the date of the petitioners approaching this Court and secondly, the petitioners showed the schedule of payment, in the memo dated 14.02.2018, submitted to the Special Court for Trial of Economic Offences. The petitioners were asked to offer their comments and the petitioners appended their signatures on the same along with date, as a token of having seen the memo; the contention of the petitioners that they are not avoiding the payment of service tax is false and misleading; the petitioners, vide statements dated 23.01.2018, recorded under Section 14 of the Central Excise Act, made applicable to service tax under Section 83 of the Act, accepted that service tax amounting to Rs.4,05,77,984/- and Rs.2,16,89,832/- respectively was collected by them, but they failed to credit to same to the Central Exchequer; the issue is not just a case of service tax evasion but a serious fraud of collecting service tax and failing to credit the same to the Central Exchequer beyond the period of six months from the date on which the said payment became due.

9. The Special Public Prosecutor, except making the above submissions in the counter affidavit and in his arguments, does not really answer the submission made by the counsel for the petitioners

that the due time for payment has not arisen, as no notice was served, as required by the Act. As regards the submission that the order granting bail has become invalid, as, the time permitted for furnishing bank guarantee has expired, it can be said that the said contention is not correct. The time given was ten days from the date of order. The order was passed on 16.02.2018 and the petition was filed on 22.02.2018 and the order was stayed on 26.02.2018.

10. With regard to the undertaking that was given by the petitioners, allegedly, the counsel for the petitioners submits that the undertaking, which is given by their counsel and not the petitioners, does not bind the petitioners. In that regard, he relies on a decision of the Supreme Court in *HIMALAYAN COOP. GROUP HOUSING SOCIETY v. BALWAN SINGH*¹ wherein it was held that, for lawyers are perceived to be agents of their clients, the law of agency does not apply strictly to client-lawyer relationship; since lawyers also stand in a fiduciary relationship to their clients; their duties are more demanding than those imposed on other agents; as part of those duties, lawyers are required to respect the client's autonomy to make decisions in his matter; as a result thereof, though lawyers, without consulting their clients, can decide about tactics/means to be adopted while dealing with cases, they should seek appropriate instructions from client or his authorized agent before making any concession/statement/admission/settlement/compromise before court which may, directly or remotely, affect the rightful legal right of the client; lawyers should follow the client's instructions rather than

¹ (2015) 7 SCC 373

substitute their judgment for that of the client; as regards settlement/compromise of a claim in court, a lawyer must be specifically authorized by his client in that regard; mere engagement of lawyer by client gives no implied or ostensible authority to lawyer to bind his client to a compromise/settlement entered into by him in court.

Hence, with the help of the above decision, the counsel for the petitioners gathers strong support for his contention that the undertaking given by the counsel cannot bind his clients i.e. petitioners herein.

11. The scheme of the provisions of the Act was explained by the Delhi High Court in two of its decisions i.e. *eBIZ.COM PVT. LTD v. UNION OF INDIA*² (para 79) and *MAKEMYTRIP (INDIA) PVT. LTD. v. UNION OF INDIA*³ (para 116) and the relevant portion of para 79 is as under:

79. To summarise the conclusions in this judgment:

(i) The scheme of the provisions of the [Finance Act](#) 1994 (FA), does not permit the DGCEI or for that matter the Service Tax Department (ST Department) to by-pass the procedure as set out in [Section 73A](#) (3) and (4) of the FA before going ahead with the arrest of a person under Sections 90 and 91 of the FA. The power of arrest is to be used with great circumspection and not casually. It is not to be straightway presumed by the DGCEI, without following the procedure under [Section 73A](#) (3) and (4) of the FA, that a person has collected service tax and retained such amount without depositing it to the credit of the Central Government.

² 2016 (44) S.T.R. 526 (DEL.)

³ 2016 (44) S.T.R. 481 (DEL.)

ii) Where an assessee has been regularly filing service tax returns which have been accepted by the ST Department or which in any event have been examined by it, as in the case of the two Petitioners, without commencement of the process of adjudication of penalty under Section 83 A of the FA, another agency like the DGCEI cannot without an SCN or enquiry straightway go ahead to make an arrest merely on the suspicion of evasion of service tax or failure to deposit service tax that has been collected. Section 83 A of the FA which provides for adjudication of penalty provision mandates that there must be in the first place a determination that a person is "liable to a penalty", which cannot happen till there is in the first place a determination in terms of Section 72 or 73 or 73 A of the FA.

(iii) For a Central Excise officer or an officer of the DGCEI duly empowered and authorised in that behalf to be satisfied that a person has committed an offence under Section 89 (1) (d) of the FA, it would require an enquiry to be conducted by giving an opportunity to the person sought to be arrested to explain the materials and circumstances gathered against such person, which according to the officer points to the commission of an offence. Specific to Section 89 (1) (d) of the FA, it has to be determined with some degree of certainty that a person has collected service tax but has failed to pay the amount so collected to the Central Government beyond the period of six months from the date on which such payment is due, and further that the amount exceeds Rs. 50 lakhs (now enhanced to Rs. 1 crore) ..."

The Court observed that, in the case with which it was dealing, the SCN was not even issued and determination of the service tax arrears was not made and in those circumstances, resorting to extreme coercive measure of arrest followed by detention of the accused therein was impermissible in law.

12. Even if it is assumed that the undertaking is given by the counsel, on clear instruction by the petitioners, the counsel for the petitioners submits that the parties cannot contract out of the benefits that are conferred by the Constitution of India or the Statutes, as the case may be and there can be no estoppel against the Constitution and Statutes. He draws support for the said contention from the decision of the Supreme Court in *OLGA TELLIS v. BOMBAY MUNICIPAL CORPORATION*⁴. The Supreme Court observed as under:

“...A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will in violation of their fundamental rights.”

The Supreme Court was dealing with a case of pavement dwellers where the dwellers gave an undertaking to vacate the footpaths and that undertaking was brought against the footpath dwellers therein and while appreciating the violation of such undertaking, the Supreme Court held as above. It further held that there can be no estoppel against the Constitution; the Constitution is not only the paramount law of the land but it is the source and sustenance of all laws; the doctrine of estoppel is based on the

⁴ (1985) 3 SCC 545

principle that consistency in word and action imparts certainty and honesty to human affairs; if a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. It was held that the said principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he do not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. It was further observed that fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. It was also held that no individual can barter away the freedoms conferred upon him by the Constitution and were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits.

13. In support of his contention that it is not only estoppel against Constitution that is held to be invalid but also against any Statute, the counsel for the petitioners takes support of the decision of the Supreme Court in *STATE OF UTTAR PRADESH v. UTTAR PRADESH RAJYA KHANIJ VIKAS NIGAM SANGHARSH SAMITI*⁵ wherein it was held that from the record it appears that it was the case of the

⁵ (2008) 12 SCC 675

Secretary of the Corporation that no such assertion was given by him to the Court; but even if he had given such assertion it was of no consequence since in the teeth of the Statutory rules, such assertion had no legal efficacy.

14. In the light of the above legal position, the decision of the High Court of Chhattisgarh in Miscellaneous Criminal Case No.4980 of 2013 dated 22.11.2013, on which the Special Public Prosecutor relies upon, cannot be followed. In the said case, the Court relied on the undertaking given by a party therein and imposed conditions in pursuance of the said undertaking, while granting bail to the petitioner therein.

15. The Court, on the basis of the undertaking given by a party, cannot convert itself into an executing Court to execute the terms agreed by the party, while deciding the bail application. Hence, with the above legal scenario, in the background, the condition imposed by the Court below to the extent of directing the petitioners to furnish bank guarantee for the remaining amount cannot be sustained and is set aside.

Hence, the criminal petitions are allowed. As a sequel, the miscellaneous applications, if any pending, shall stand closed.

March 12, 2018
DSK

T. RAJANI, J