**IN THE HIGH COURT OF JUDICATURE AT BOMBAY**
**CIVIL APPELLATE JURISDICTION**

**WRIT PETITION NO. 8835 OF 2018**

Neelkamal Realtors Power Pvt.Ltd. & Anr. ...Petitioners
vs
The Union of India & Ors. ...Respondents

Mr.Shriram Shridharan I/b. PDS Legal for Petitioners.
Mr.Vijay Kantharia with Ram Ochani for Respondent Nos.1 to 5.

**CORAM : M.S. SANKLECHA &**
**S.C. GUPTE, JJ.**

**DATE : 30 JULY 2019**

**P.C. :**

On 26 July 2019, we passed the following order :

“. This petition under Article 226 of the Constitution of India challenges the action of the Respondents in compelling the Petitioners to pay (by reversing the Cenvat Credit available) an amount of Rs.11.25 crores to the Revenue before the issue of any show cause notice under the Finance Act, 1994.

2. It is the case of the Petitioners that the aforesaid amount of Rs.11.25 crores was reversed by the Petitioners as the Respondents during investigation threatened arrest in the absence of payment/reversal of Cenvat Credit. This even though the Petitioners had given to the officers of the Revenue opinions of Advocates to the effect that no arrest in such facts is permissible. The Petitioners placed reliance upon the decisions of the Supreme Court in **Dabur India Ltd. vs. State of Uttar Pradesh** [1990 4 SCC 113] along with the orders of this Court in **Vodafone Essar South Ltd. vs. Union of India** [2009 237 ELT 35 (Bom.) and **Cleartrip Pvt. Ltd. vs. UOI** [2016(42) STR 948 (Bom.)], to contend that strong-arm tactics by the officers of the Revenue in recovering the

> amount allegedly due even before the show cause notice has been adjudicated is bad in law. In fact, it is a clear case of subversion of rule of law. In the facts of this case, due to strong-arm tactics of the Revenue, the Petitioners were compelled under the threat of arrest to reverse the Cenvat Credit, even when no show cause notice was issued, much less adjudicated upon.
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> 3. On the other hand, Mr. Kantharia, learned Counsel for the Respondents, states that on affidavit the officer of the Respondents stated that there was no threat of arrest ever issued to the Petitioners. Therefore, the statement of the Petitioners should not be accepted. He further submits that a show cause notice has already been issued. Therefore, no orders should be passed. We are, in the facts of the case and evidence placed before us, not impressed with the submissions made on behalf of the Respondents and were proceeding to pass an order finally. At that time, Mr. Kantharia, learned Counsel for the Respondents, sought time to take further instructions and prepare himself better, as this petition was shown under the caption of admission.
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> 4. In the above view, we grant time at the request of the Revenue. However, we put to notice parties to the petition that it will be taken up for final hearing on 30 July 2019."

2 Today, when the matter was called out, Mr.Kantharia, learned Counsel appearing for the Respondents, filed an additional affidavit in reply of Mr.Abhijit Thorat, Assistant Commissioner of CGST & Central Excise, Mumbai (East) Commissionerate, dated 29 July 2019. In the above affidavit, the deponent has explained the reason why the show cause notice dated 28 September 2018, as amended by the corrigendum dated 9 October 2018, could not be adjudicated till today.

3 The issue in the present facts, as pointed out above, was the action of the Respondents in pressuring the Petitioners under the threat of arrest of its Directors/officers at the time of investigation to reverse Cenvat Credit amounting to Rs.11.25 crores taken as tax paid on services provided by one Indo Global Soft Solutions & Technologies Pvt.Ltd. This in the absence of any adjudication order adverse to the Petitioners being passed or even issue of any show cause notice. In view of the threat of arrest during investigation, the Petitioners had furnished to the Revenue, at a meeting held on 2 May 2018, opinions of Advocates pointing out that in these facts, no arrest proceedings could be initiated against the Petitioners. In spite of the above, the officers of the Respondents, as recorded by the Petitioners in their letter dated 7 May 2018, continued to pressurise the Petitioners of coercive proceedings, if the Cenvat Credit was not reversed. In this view of the matter, the Petitioners were compelled to reverse the Cenvat Credit of Rs.11.25 crores. It is further pointed out that the aforesaid letter dated 7 May 2018 was not disputed by the officers at any point of time prior to the filing of this petition. This action of the Respondents, it is submitted, is in the face of binding decisions of the Apex Court and this Court in **Dabar India Ltd.** (supra), **Vodafone Essar South Ltd.** (supra) and **Cleartrip Pvt. Ltd.** (supra)

4 Mr.Kantharia, learned Counsel appearing for the Revenue, submits that the Petitioners are builders and they are not one to be coerced or threatened by the officers informing them about the possibility of arrest and therefore, it is not correct to proceed on the basis that the Petitioners paid the amount only because of threat. Moreover, reliance is placed on the affidavits filed by the Revenue that no threat of arrest was given to the

Petitioners. There is no reason to disbelieve the Revenue. Thus, no interference in writ jurisdiction is warranted. It is further submitted that the show cause notice is pending adjudication and therefore, no purpose would be served by permitting the Petitioners to recredit the amount, which was reversed by the Petitioners at the instance of the Respondents, as if the show cause notice is adjudicated in favour of the Petitioners, the amount would be refunded to the Petitioners in any case. Thus, dismiss the petition.

5 We have considered the rival submissions. The issue raised in the petition, if correct, gives rise to a very serious issue of Rule of law. However, the above issue would only arise for our consideration on first determining whether in the facts, the grievance of the Petitioners that the recovery of the Cenvat Credit under the threat of arrest is true. The undisputed facts are that the Petitioners were under investigation for incorrectly availing of Cenvat Credit. During the time of investigation, i.e. even before any show cause notice was issued, the Petitioners reversed the Cenvat credit of Rs.11.25 crores. This, the Petitioners claim, was under pressure from the officers of the Revenue, more particularly because of the threat of arrest. This we find is evident from the fact that the Petitioners had sought opinion of legal experts, whether on the facts of the case, is it possible for the Revenue to arrest them. This opinion was also furnished on 2 May 2018 to the Officers of the Revenue, this fact is recorded in the Petitioners' letter dated 7 May 2019 along with the fact of continuing pressure of the Revenue to reverse the credit. The aforesaid letter dated 7 May 2018 was not disputed by the Revenue, in spite of the serious charge of threating to arrest the Petitioners' director. It is only now for the first

time, the Revenue in the affidavit in reply of Mr.Clint D'Silva, Assistant Commissioner of CGST & Central Excise, Mumbai (East) Commissionerate, dated 10 August 2018 has responded to the Petitioners' allegation of threat of arrest, by stating as under :

> "The department would like to state that neither any written nor oral communications were issued to the petitioners for "the threat of arrest". The contention of the Petitioner is far from the truth. Assuming without accepting the malicious allegations levelled by the Petitioners, they being the responsible citizens of India, ought to have approached the proper forum for their redressal than approaching this Hon'ble High Court."

This does not dispute the facts contemporaneously recorded in the Petitioners' letters dated 7 May 2018. Thus, in these facts, we find that the Petitioners were coerced to reverse the Cenvat Credit under the threat of arrest.

6 Therefore, we now examine the issue, whether such action on the part of the Revenue is at all permissible. The contentions of the Revenue is that the Petitioners are builders and could not be coerced in reversing the Cenvat Credit on the threats of arrests. This is no explanation for the unbecoming conduct of the officers of the State who are duty bound to treat all equally. The officers' perception about, whether the Petitioners would act upon the threat or not, cannot give a licence to the Respondents to act in such illegal and high handed manner. The Supreme Court in **Dabar India Ltd.** (supra) has observed in para 31 as under :

> "We would not like to hear from a litigant in this country that

> the Government is coercing citizens of this Country to make payment of duties which the litigant is contending not to be leviable. Government, of course, is entitled to enforce payment and for that purpose to take all legal steps but the Government, Central or State, cannot be permitted to play dirty games with the citizens of this country to coerce them in making payments which the citizens were not legally obliged to make. If any money is due to the Government, the Government should take steps but not take extra-legal steps or manoeuvre. .......”

Further this court in **Vodafone Essar South Ltd. vs. Union of India (**supra) has in similar circumstances passed strictures against the officers of D.R.I., who terrorized the petitioners therein and forced them to pay the money which was not permissible in law. The Court observed that the conduct of the officers was high handed and a gross abuse of the powers vested in them under the Customs Act. Similarly, in **Cleartrip Pvt. Ltd. vs. Union of India (**supra)[1], this Court observed as under :

> “16. We are clear in our minds and from the scheme of the Act and the Law as a whole that coercive measures, including effecting any arrest, would arise only when investigation has been completed and on launching the prosecution. If the prosecution is a criminal prosecution, then, there is no question of deviating or defeating from the Criminal Law. The Criminal Law contains several provisions including protective measures, which would enable the Petitioners to resist any arrest, as apprehended. In the scheme of the Criminal Law and particularly the Finance Act, 1994 as well, if it contains any penal provisions, it is not as merely because the investigations are underway that the arrest would be effected. Eventually, all that the Respondents are presently contemplating is to investigate the matter. The Petitioners do not dispute the right to investigate and in

1 **2016 (4) STR 948**

> accordance with law. That they have already attended the offices of the concerned Respondents and once the statement of the Petitioners was recorded goes without saying that on further summons being issued and on called upon to attend the Officers of the Respondents, they will attend and co-operate in these investigations by producing all the documents and answering the requisite queries, subject, of-course, to their rights in law. It is only when these investigations conclude that the authorities would be in a position to take a decision whether to launch any prosecution. In such a prosecution as well, if the provisions of the Criminal Law, which enable arrest in cases of cognizable offences and non-bailable, that the Petitioners can have an apprehension and which also can be taken care of by approaching a competent Criminal Court. Secondly, there is no question of any recovery of tax by coercive means, unless the investigation results into issuance of a show cause notice, an opportunity to the Petitioner to resist the demand, a adjudication thereof by a reasoned order and protective remedies such as appeals. We do not think that any recovery by coercive measures is straightway permissible and particularly in the given facts and circumstances of the case."

7 Therefore, the Supreme Court as well as our High Court has repeatedly held that rule of law has to be followed and no officers of the respondent can take law in his own hands or take extra-legal steps or manoeuvre so as to collect amounts which have not yet been held by judicial and/or quasi judicial order as payable by the petitioners to the respondent. The affidavit in reply merely states that if the Respondents had given such threats to the Petitioners, then the Petitioners should have approached the proper forum for their redressal. This does not meet the allegations made by the Petitioners on oath that the Petitioners were threatened with possible arrest if they do not reverse a Cenvat Credit of Rs.11.25 crores. It is pertinent to note that there is no contemporaneous

evidence inasmuch as there is no reply by the Respondents to the Petitioners' letter dated 7 May 2018 that clearly speaks about the threat of arrest . This serious allegation was not responded to by any denial on the part of the Respondents at that time. The events as well as the material placed on record by the Petitioners, after considering the affidavits filed by the Respondents, lead us to conclude that the Respondents have acted in a high handed manner and forced the Petitioners under the threat of arrest to reverse the Cenvat Credit of Rs.11.25 crores before the show cause notice was issued or before any adjudication order thereon was passed. In these circumstances, we direct the Respondents to allow the Petitioners to recredit the amount of Rs.11.25 crores in their Cenvat Credit account. However, the Petitioners are prohibited from utilising the same till the adjudication of the show cause notice dated 28 September 2018 by the Commissioner, GST & CX.

8 Mr.Kantharia, learned Counsel appearing for the Respondents states that the show cause notice would be adjudicated, as expeditiously as possible, and latest within a period of five weeks from today. This of course subject to the Petitioners co-operating the Respondents.

9 The petition is allowed in the above terms.

**(S.C. GUPTE, J.)** **(M.S. SANKLECHA, J.)**