IN THE HIGH COURT OF JUDICATURE AT BOMBAY, NAGPUR BENCH, AT NAGPUR.

CRIMINAL APPLICATION (APPP) NO.1020 OF 2019
IN
CRIMINAL APPLICATION (APL) NO.313 OF 2019

(The Deputy Director of Income Tax, Nagpur ..vs.. State of Maharashtra, through Nandanvan PS, Nagpur and another)

Office Notes, Office Memoranda of Coram, appearances, Court's orders of directions and Registrar's orders	Court's or Judge's orders

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Shri Anand Parchure, Counsel for the applicant,
Ms. Ritu Kaliya, Addl.P.P. for non-applicant 1,
None for non-applicant 2.

CORAM : ROHIT B. DEO, J.
DATED : 09-08-2019

I have heard Shri Anand Parchure, learned Counsel for the applicant and Ms. Ritu Kaliya, learned Additional Pubic Prosecutor for non-applicant 1.

2. Non-applicant 2 has failed to appear before this Court. This application was listed on 05-7-2019. Shri A.V. Gupta, learned Senior Counsel who appeared on behalf of non-applicant 2 in Criminal Application (APL) 313/2019 stated that he did not have instructions in the matter and that non-applicant 2 may be heard before any order is passed. In view of the submission of the learned Senior Counsel, this Court directed issuance of notice to non-applicant 2. This Court further observed that *prima facie* the failure of non-applicant 2 to furnish the corporate bank guarantee within a reasonable time may constitute contempt and the issue would have to be

addressed. This Court, therefore, directed issuance of notice to Shri Ali Hussain Jiwani-the Director of non-applicant 2 to show cause why the failure of non-applicant 2 to furnish the bank guarantee shall not be considered as contemptuous. In addition to regular mode of service, the applicant was permitted to serve Shri Ali Hussain Jiwani by Email, Fax, Registered Post acknowledgment due or any other mode of communication.

The Crime Branch, Nagpur submitted a report that Shri Ali Hussain Jiwani-the Director of non-applicant 2 is not traceable. The report states that Police Constable Naresh Thaware visited the last known address of non-applicant 2 on 11-7-2019 and was told that Shri Ali Hussain Jiwani is not residing at the said address since last one month. The Crime Branch contacted the brother of Shri Ali Hussain Jiwani who informed that he was not in touch with Shri Ali Hussain Jiwani since two to three months nor is he aware about the whereabouts of Shri Ali Hussain Jiwani. In this view of the matter, vide order dated 12-7-2019 this Court permitted the applicant authority to publish the notice in two prominent daily newspaper having vide circulation in Nagpur, one of which shall be Hindi newspaper.

The notice is duly published in newspapers Dainik Bhaskar and Hitawada on 18-7-2019. However, despite the publication of the notice, non-applicant 2 has not appeared in this matter nor has Shri Ali Hussain Jiwani responded to the show cause notice.

This Court, therefore, is left with no option but to proceed in the absence of non-applicant 2.

3. This application is taken out by the Deputy Director of Income Tax seeking modification of the order dated 25-3-2019 in Criminal Application 313/2019.

4. The order dated 25-3-2019 is a consent order. Criminal Application 313/2019 was preferred by the Deputy Director, Income Tax assailing the order dated 30-10-2018 rendered by the Chief Judicial Magistrate, Nagpur in Miscellaneous Criminal Applications 1831/2018 and 1524/2018 thereby rejecting the application preferred by the Income Tax Authority for custody of the amount of Rs.5,70,89,880/- and directing that the said amount be released in favour of non-applicant 2 herein M/s. Maple Jewellers Pvt. Ltd.

5. Paragraphs 3 and 4 of the order dated 25-3-2019 which incorporate the consent terms read thus :

> *"3. Heard Shri Anand Parchure, the learned Counsel for the petitioner and Shri Avinash Gupta, the learned Senior Counsel for respondent 2. It would not be necessary to articulate in detail the challenge to the order impugned. The petitioner and the respondent 2 agree that the order impugned could be modified by directing the respondent 2 M/s Maple Jewelers Pvt. Ltd. to furnish corporate bank guarantee issued by Nationalized Bank to secure the amount in question.*

Both the learned counsel have no objection if the orders impugned are modified and instead of bond the respondent 2 M/s. Maple Jewelers Pvt. Ltd. is directed to furnish corporate bank guarantee issued by Nationalized Bank to secure claim of the Income Tax Department, if any, upon completion of the assessment proceedings.

4. The order dated 30-10-2018 rendered in Criminal Application 1524/2018 is modified and respondent 2 M/s. Maple Jewelers Pvt. Ltd. is directed to furnish corporate bank guarantee issued by Nationalized Bank for Rs.5,70,89,880/-, issued in favour of the petitioner herein, to secure any claim towards tax or penalty which the Income Tax Department may have upon completion of the assessment proceedings."

6. However, since non-applicant 2-M/s. Maple Jewelers Pvt. Ltd. failed to furnish the corporate bank guarantee, the present application is preferred by the Income Tax Authority seeking modification of the order dated 25-3-2019. A direction is sought that the seized cash and the interest accumulated thereon be handed over to the Income Tax Authority. The Income Tax Authority contends that the seized amount is unaccounted cash and that on the basis of information provided by the Senior Police Inspector, Nandanvan Police Station, Nagpur, the Principal Director of Income Tax (Investigation) issued warrant under sub-section (1) of Section 132-A of the Income Tax Act dated 03-5-2018 authorising the Deputy Director of Income Tax (Investigation) to require the Police Inspector,

Nandanvan Police Station to deliver the assets taken into custody by the Investigating Officer. The warrant is issued on the premise that the cash seized is not disclosed for the purpose of the Income Tax Act, 1961.

It is stated that after issuance of the said warrant, it is revealed that the total unaccounted cash which is seized is Rs.5,70,89,880/-. The applicant authority contends that the seized cash is unaccounted and evidences *Hawala* operations. It is stated that the investigation by the Income Tax Department is ongoing.

4. Certain significant events have transpired post the order dated 25-3-2019. The Income Tax Authority initiated the assessment proceedings against non-applicant 2 and the alleged Director in which proceedings despite the best efforts made by the Income Tax Authority to secure the presence of non-applicant 2 and the alleged Director, there is no appearance on behalf of non-applicant 2 or the alleged Director Shri Ali Hussain Jiwani. The Income Tax Authority has further initiated proceedings under the Prohibition of Benami Property Transactions Act, 1988 ("PBPT Act") as amended by the Benami Transactions (Prohibition) Amendment Act, 2016.

In the proceedings under the PBPT Act, two orders are passed on 14-6-2019 in respect of the seized amount. By these orders which are passed under Section 24(4)(a)(i) of the PBPT Act, the provisional attachment made under Section 24(3) of the PBPT Act is continued until such time as passing of order under Section 26(3) of the PBPT Act by the adjudicating authority.

5. In these glaring facts, the irresistible inference is that non-applicant 2-M/s. Maple Jewelers Pvt. Ltd. is not likely to furnish the bank guarantee. Indeed, non-applicant 2 nor its alleged Director are appearing before the Income Tax Authority. Non-applicant 2 and its alleged Director are not responding to this Court's notice. The seized amount is lying in the custody of the Investigating Officer. It is stated by the learned Additional Public Prosecutor, on instructions, from the Investigating Officer who is present in the Court that the amount is lying in the saving bank account of the police station. In view of the failure of non-applicant 2-M/s. Maple Jewelers Pvt. Ltd. to abide by the consent order, the fact that *prima facie* non-applicant 2 and its alleged Director are evading the process of law and particularly, the fact that quasi judicial orders are passed under the PBPT Act, I deem it appropriate to modify the order dated 25-3-2019.

6. The order dated 25-3-2019 is modified and the Investigating Officer is directed to hand over the seized amount of Rs.5,70,89,880/- to the applicant authority within seventy-two hours alongwith the accumulated interest, if any.

7. In view of the order dated 25-3-2019, it would not be necessary to proceed with the show cause notice issued to Shri Ali Hussain Jiwani under the Contempt of Courts Act, and the same is dropped.

8. This application is allowed and disposed of in the aforestated terms.

9. Steno copy of this order is furnished to the learned Additional Public Prosecutor as per rules.

JUDGE

adgokar