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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

WRIT PETITION NO.630 OF 2023

Petrus Lambertus Maria Hermans … Petitioner

V/s.

Income Tax Officer ACIT (TDS) -1(3), Smt, K.G. Mittal Ayurvedic Hospital Building, Charni Road (West), Mumbai-400 002 and Anr … Respondents

Mr. Aditya Iyer a/w Shreyas Lele i/b Khaitan Legal Associates for the petitioner.

Mr. Amit Munde SPP for respondent No.1.

Mr. M.G. Patil APP for the State.

CORAM : AMIT BORKAR, J.

DATED : MARCH 13, 2023

P.C.:

1. The challenge in this petition is to the order dated 18th November, 2019 issuing process against the petitioner and others for alleged offence under Section 276B read with Section 278B of the Income Tax Act, 1961.

2. The contentions raised on behalf of the petitioner are that the petitioner is professional executive director who had not taken part in the affairs of the Company in last Six years, he is resident of Netherlands, the averments in the complaint are insufficient to constitute offence under Section 276B read with Section 278B of the Income Tax Act, 1961.

3. In support of his submission he relied on the judgment of the Apex Court in the case of **National Small Scale Industries Corporation Vs. Harmeet Singh Paintal and Another** reported in (2010) 3 SCC 330 and **Dayle De'souza Vs. Government of India Through Deputy Chief Labour Commissioner © and Anr** reported in 2021 SCC OnLine SC 1012.

4. *Per contra,* learned advocate for the respondent No.1 invited my attention to the provisions of Section 276B read with Section 278B of the Income Tax Act, 1961. Additionally, he invited my attention to the sanction order which takes into consideration the role of the petitioner, treating him as a Director Incharge and responsible for the affairs of the Company. He also invited my attention to the order passed by the learned Commissioner, *prima facie,* recording a satisfaction that the conditions under Section 276B and 278B are fulfilled. In support of his case he relied on the judgment of Apex Court in the case of **Madhumilan Syntex Ltd and others Vs. Union of India and Anr** reported in (2007) 11 SCC 297.

5. In the wake of submissions made on behalf of the petitioner it is necessary to consider the averments in the complaint.

6. In paragraph 6 and 8 of the complaint reads as under :-

> 6. The complainant submits that the above named Accused being responsible persons for paying tax as per section 204 of the I.T. Act have committed a default under Section 200 of the I.T. Act, 1961 read with Rule 30 of the Income Tax Rules, 1962 by failing without reasonable cause or to pay the tax so deducted under various section of the I.T. Act, 1961 from payments made to various parties. That the said default amounts to an offence punishable u/s 276B r/w S.278B of the

> I.T. Act, 1961.
>
> 8. It is further respectfully submitted thathe Accused are being the directors Accused are also liable for the said acts, omission and contravention committed by the Accused and therefoer they are also liable to be prosecuted and to be punished for the act committed by the Accused as per U/s. 276-B of the I.T. Act, 1961.

7. Additionally, paragraph 3 as reflected in sanction order reads as under :-

> From the Return of Income for AY 2017-18. It is observed that there are five directors namely Vipin Jain, Paramjitsingh Datarsingh Sahi, Karanraj Parmjeet Sahi Harkeerat Paramjitsingh Sahi and Petrus Lambertus Maria Hermans. The directors were in charge of and responsible to the Company & for conduct of business of the Company for the relevant year and therefore liable for prosecution within the meaning of Section 278B of the Act.

8. Paragraph 9 of order of learned Commissioner of Income Tax reads as under :-

> 9. Thus, the above mentioned persons being persons responsible for paying tax as per section 204 of the I.T. Act have committed a default under Section 200 of the I.T. Act, 1961 read with Rule 30 of the Income Tax Rules, 1962, by failing without reasonable cause or to pay the tax so deducted under various sections of the I.T. Act, 1961 from payments made to various parties. That the said default amounts to an offence punishable u/s 276B r.w.s 278B of the I.T. Act, 1961.

9. Conjoint reading of the complaint along with sanction order and the order passed by the learned Commissioner, at this stage, are sufficient to comply with the requirement of necessary pleadings to hold a person as in charge and responsible for the affairs of the company.

10. The requirements as mandated by paragraph 39 in the case of **National Small Industries Corporation Limited** (supra) have been made by making averments in paragraph 6 and 8 of the complaint. Though the language of Section 278B is similar to Section 141 of the Negotiable Instruments Act, 1881. However, in case of complaint under Section 138 of the Negotiable Instruments Act, 1881 there is no application of mind by the statutory authorities before initiation of the complaint. In the case of prosecution under Income Tax Act, sanction order and the order passed by learned Commissioner of Income Tax indicate *prima facie* application of mind by the statutory authorities before initiation of the complaint under Section 276B read with Section 278B of the Income Tax Act, 1961.

11. Therefore, in my opinion, the respondent No.1 at this stage has made out a sufficient case for proceeding against the petitioner.

12. In so far as, the contention of the petitioner that he is not residing in India and is resident of Netherlands for Six years is concerned, learned advocate for the respondent No.1 invited my attention to the sanction order which contains address of the petitioner as being resident of Navi Mumbai, Maharashtra. Whether the petitioner was actually residing in Netherland for Six years or not has to be decided at the time of trial of the complaint or at the appropriate stage which is permissible. At this stage, scope of inquiry is to ascertain as to whether the averments in the complaint are sufficient to constitute offences alleged against the petitioner or not.

13. On consideration of material which was before the learned Magistrate, in the form of sanction order, order of learned Commissioner of Income Tax and the averments in the complaint, no interference is called for in order of issuance of process.

14. The writ petition is, therefore, dismissed. No costs.

(AMIT BORKAR, J.)