

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

Criminal Writ Petition No.3962 of 2022

Anish Modi
Age- 52 years
314 Shalaka, Maharshi Karve Road
Mumbai -4 00021

.... Petitioner.

Vs.

1. Union of India
Through V. K. Mangla
Assistant Commissioner of
Income Tax (TDS)-3(2),
Room No.1012, 10th Floor,
K.G.Mittal Ayurvedic
Hospital Building,
Opp.Charni Road Station (West),
Mumbai -400 002

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2. The State of Maharashtra

.... Respondents.

Mr Vineet Naik, Senior Advocate, a/w Mr Vikrant Singh Negi, Ms Ekta Tyagi, Mr Pratik M. Thakkar, Ms Priyamvada Singhania, Anjali Shah and Ms. Sneha Barange i/b DSK Legal for the petitioner.

Mr Suresh Kumar a/w Ms Mohini Chougule for respondent No. 1.
Ms SD Shinde, APP for respondent No.2-State.

Coram : R. N. Laddha, J.

Reserved on : 27 October 2023.

Pronounced on : 20 December 2023.

Judgment:

Heard the learned Counsel for the parties.

2. Rule. The Rule is made returnable forthwith, with the consent of and at the request of the learned Counsel for the parties.

3. The petitioner (original accused No.8) seeks to challenge the Order dated 18 February 2014 and the Order dated 21 July 2022, whereby the learned Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai, in Criminal Case No.52/SW/2014 (for short, 'Criminal Case') issued the process and the fresh summons against him. He also prays to this Court to quash the Criminal Case filed by respondent No.1 against him for the offence punishable under sections 276-B read with 278-B of the Income Tax Act, 1961 (for short, 'the I.T. Act').

4. Mr Vineet Naik, the learned Senior Counsel appearing on behalf of the petitioner, submitted that the petitioner served as an independent, non-executive, and nominee director on the Board of S. Kumar Nationwide Limited (for short, 'the company') from 27 June 2007 to 12 November 2011. For the financial year 2008-2009, the company failed to deposit the TDS amount of Rs.2,98,29,252/- to the credit of the Central Government within the prescribed period; however, this amount was subsequently paid by the company in September 2010. He further submitted that the

petitioner became aware of the Criminal Case and the orders passed thereunder only on 5 September 2022, when he received a copy of the summons dated 3 August 2022.

5. The learned Senior Counsel submitted that the learned Magistrate issued the process mechanically and without any application of mind against the petitioner. He submitted that the learned Magistrate failed to appreciate that the complaint does not contain any specific averments or unambiguous allegation *qua* the petitioner's role in the commission of the alleged offence. His main contention is that the petitioner is not the principal officer under Section 2(35) of the I.T. Act, and he was never served with any notice treating him as a principal officer as required under clause (b) of Section 2(35) to initiate a prosecution under sections 276-B read with 278-B of the I.T. Act.

6. He relied on (i) *Madhumilan Syntex Ltd. Vs. Union of India*, (2007) 11 SCC 297; (ii) *Municipal Corporation of Delhi Vs. Ram Kishan Rohtagi*, (1983) 1 SCC 1; (iii) *Sham Sunder Vs. State of Haryana*, (1989) 4 SCC 630; (iv) *S.M.S. Pharmaceuticals Ltd. Vs. Neeta Bhalla*, (2005) 8 SCC 89; (v) *Pooja Ravinder Devidasani Vs. State of Maharashtra*, (2014) 16 SCC 1; (vi) *Sunita Palita Vs. Panchami Stone Quarry*, (2022) 10 SCC 152; (vii) *Lalankumar Singh Vs. State of Maharashtra*, 2022 SCC OnLine SC 1383; (viii) *Ashoke Mal Bafna Vs. Upper India Steel Mfg. & Engg. Co. Ltd.*, (2018) 14

SCC 202; (ix) State of Haryana Vs. Brij Lal Mittal, (1998) 5 SCC 343; (x) Sunil Bharti Mittal Vs. CBI, (2015) 4 SCC 609; (xi) Iridium India Telecom Ltd. Vs. Motorola Inc., (2011) 1 SCC 74; (xii) Maksud Saiyed Vs. State of Gujarat, (2008) 5 SCC 668; (xiii) National Small Industries Corpn. Ltd. Vs. Harmeet Singh Paintal, (2010) 3 SCC 330; (xiv) Pepsi Foods Ltd. Vs. Special Judicial Magistrate, (1998) 5 SCC 749; (xv) Homi Phiroz Ranina Vs. State of Maharashtra, 2003 SCC OnLine Bom 118; (xvi) Income-Tax Officer Vs. Official Liquidator, 1975 SCC OnLine AP 185; (xvii) Greatway (P) Ltd. Vs. Assistant Commissioner of Income-Tax, 1991 SCC OnLine P&H 1353; (xviii) Income-Tax Officer Vs. Joseph, 1971 SCC OnLine Ker 128; (xix) K. Ramakrishnan and Ors. Vs. Income Tax Department, Madurai and Ors., Crl. O.P.(MD) Nos. 16082 to 16084 of 2018, dated 25.10.2019 (Madras High Court); (xx) M.A. Unneerikutty Vs. Dy. Commr. of Income Tax, 1994 SCC OnLine Ker 92; (xxi) Confident Projects (India) (P) Ltd. Vs. CIT, (2021) 1 HCC (Kar) 285; (xxii) Vivek Goenka Vs. State of Maharashtra, 2003 SCC OnLine Bom 201; (xxiii) Ionic Metalliks Vs. Union of India, 2014 SCC OnLine Guj 10066; (xxiv) Om Prakash Bhatt Vs. State of Maharashtra, 2019 SCC OnLine Bom 3711; and (xxv) A. Harish Bhat Vs. CIT, 2019 SCC OnLine Kar 3998, in support of his contentions.

7. On the other hand, Mr Suresh Kumar, the learned Counsel appearing on behalf of respondent No.1, submitted that the

learned Magistrate has rightly issued a process against the petitioner. He stated that before initiating the prosecution under Sections 276-B and 278-B of the I.T. Act, respondent No.1 sent a notice under Section 2(35) of the I.T. Act to the assessee company on 16 December 2013 to nominate the principal officer. After the company nominated Jagadeesh Shetty as a principal officer, the department rejected the nomination as Mr Shetty was not a director at the time of the offence. The Department then issued another notice under Section 2(35) of the I.T. Act on 22 January 2014, granting the assessee company another opportunity to nominate the principal officer. The notice stated that if the Department did not receive a reply, it would treat all thirteen directors of the company as principal officers and initiate appropriate action without further intimation.

8. The learned Counsel further argued that before filing the complaint, the Department followed all necessary procedures, and accordingly, sanction was granted by the CIT (TDS). The petitioner, a non-executive independent director of the company, regularly attended the meetings of the Board at the time of the commission of the offence. Therefore, he was well aware of all the legal and administrative matters of the company and cannot take the benefit of his designation as an independent director to absolve him from the prosecution under Section 278-B of the I.T. Act. In

support of his contentions, he relied upon the decision of the Hon'ble Supreme Court in *Asstt. Commr. Vs. Velliappa Textiles Ltd., (2003) 11 SCC 405*.

9. This Court has given anxious consideration to the rival contentions and examined the record with reference to the applicable law.

10. Section 276-B of the I.T. Act lays down the punishment for non-payment of tax deducted at source to the credit of the Central Government as required under Chapter XII-D or XVII-B of the I.T. Act. Section 278-B of the I.T. Act reads as follows:

“278B. (1) Where an offence under this Act has been committed by a company, every person who, at the time the offence was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment if he proves that the offence was committed without his knowledge or that he had exercised all due diligence to prevent the commission of such offence.

(2) Notwithstanding anything contained in sub-section (1), where an offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such

director, manager, secretary or other officer shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

(3) Where an offence under this Act has been committed by a person, being a company, and the punishment for such offence is imprisonment and fine, then, without prejudice to the provisions contained in sub-section (1) or sub-section (2), such company shall be punished with fine and every person, referred to in sub-section (1), or the director, manager, secretary or other officer of the company referred to in sub-section (2), shall be liable to be proceeded against and punished in accordance with the provisions of this Act.

Explanation.—For the purposes of this section,—

(a) "company" means a body corporate, and includes—

(i) a firm; and

(ii) an association of persons or a body of individuals whether incorporated or not; and

(b) "director", in relation to—

(i) a firm, means a partner in the firm;

(ii) any association of persons or a body of individuals, means any member controlling the affairs thereof."

11. The term 'person' is defined under section 2(31) of the I.T. Act and includes a company. As per sub-section (35) of Section 2 of the I.T. Act, principal officer with reference to a local authority or a company or any other public body or any association of persons or any body of individuals, means (a) the secretary,

treasurer, manager or agent of the authority, company, association or body, or (b) any person connected with the management or administration of the local authority, company, association or body upon whom the Assessing Officer has served a notice of his intention of treating him as the principal officer thereof.

12. In order to treat a person as a 'Principal Officer' as defined under section 2(35)(b) of the I.T. Act, the following conditions must be satisfied: (i) he must be a person connected with the management or administration of the company, and (ii) the Assessing Officer must have served upon him a notice of his intention of treating him as the principal officer of the company.

13. In *M.R. Pratap v. V.M. Muthuramalingam, 1983 SCC OnLine Mad 272*, the Madras High Court held that under section 2(35) of the I.T. Act, any person connected with the company not being the secretary, treasurer, manager or agent, cannot be treated as a principal officer of the company unless the ITO has served a notice as required under clause (b) of the section. In that case, admittedly, the Department did not serve the petitioner therein, who was a managing director, with a notice treating him as a principal officer; thus, he could not be held liable under section 276B of the Act.

14. In the present case, it is not the case of respondent No.1 that

the notice as contemplated by Section 2(35) of the I.T. Act has been served upon the petitioner. Although, the petitioner is not classified under Section 2(35)(a) as an individual who can be treated as a principal officer without notice, but he falls under the category of persons specified under Section 2(35)(b), where he can be treated as a principal officer only upon service of notice to prosecute him under the purview of Sections 276-B and 278-B of the I.T. Act. Though the Department claimed that it sent the notice to the assessee company and its directors, the fact remains that it was never delivered to the petitioner. Further, the record does not indicate that the Department took any steps to ensure the delivery of the notice before initiating prosecution. Since the Department did not comply with the mandatory condition as enumerated in Section 2(35)(b), this Court finds it difficult to accept the contention of respondent No.1/Department that it followed all necessary procedures before initiating prosecution against the petitioner.

15. Additionally, a bare perusal of the Order dated 18 February 2014 shows that before issuing the process, the learned Magistrate did not take into consideration the relevant provisions of the I.T. Act and determine whether the mandatory notice under section 2(35)(b) of the I.T. Act was delivered to the accused or not. Needless to state that an order of issuance of process is not an

empty formality and requires the Magistrate to apply his mind before issuing the process. Passing orders of issuance of a process without appreciating the statutory provisions and cautiously examining the material on record may put the wheels of criminal law in motion and summon an innocent individual to stand trial. Such orders are liable to be quashed and set aside.

16. In the present matter, this Court has not discussed and dealt with the other grounds of the petition mainly because this Court is satisfied that the statutory requirement of service of notice as contemplated by Section 2(35)(b) of the I.T. Act is not complied with. This non-compliance goes to the root of the matter and dents the prosecution against the petitioner.

17. For all the above reasons, Criminal Case No.52/SW/2014 filed before the learned Additional Chief Metropolitan Magistrate, 38th Court, Ballard Pier, Mumbai, and the Orders dated 18 February 2014 and 21 July 2022 passed thereunder are quashed and set aside *qua* the petitioner only.

18. The present petition stands allowed accordingly.

[R. N. Laddha, J.]