(2015) 08 BOM CK 0297

In the Bombay High Court

Case No : Writ Petition (L) No. 440 of 2015

Anurag Kashyap APPELLANT

Vs

Union of India RESPONDENT

Date of Decision : 04-08-2015

Acts Referred:
Constitution of India, 1950 — Article 226
Finance Act, 1994 — Section 87(b)

Citation : (2015) 52 GST 215 : (2015) 40 STR 653

Hon'ble Judges : S.C. Dharmadhikari and G.S. Kulkarni, JJ.

Bench : Division Bench

Advocate : Darius Shroff, Sr. Counsel and Bharat Merchant, for the Appellant; Pradeep S. Jetly and Jitender B. Mishra, for the Respondent

Judgement

1. This petition under Article 226 of the Constitution of India seeks the following two reliefs:

"(a) This Hon''ble Court be pleased to pass an order of writ of Certiorari or any other writ or order and/or direction in the nature of Certiorari under Article 226 of the Constitution of India calling for the records of the case and after going through the legality and correctness thereof this Hon''ble Court be pleased to quash and set aside the impugned Order dated 28th August, 2013 being EXHIBIT B, EXHIBIT B1 & EXHIBIT B2 hereto issued by the Respondent No. 5 for attaching the said three Bank accounts and recovering the amounts therein with a direction to:

(i) Deposit sum of Rs. 45 lakhs in the Court

(ii) Payment of Rs. 45 lakhs with interest @ 18% p.a. w.e.f. 30th August, 2012 till his payment is made.

(iii) Deposit of payment is made pending the disposal of the present Petition.

(b) This Hon''ble Court be pleased to pass an order of writ of mandamus or any other writ, order and/or direction in the nature of mandamus under Article 226 of the Constitution of India calling for the records of the case and after going through the legality and correctness thereof this Hon''ble Court be pleased to quash and set aside the impugned order dated 28th August, 2013 issued by the Respondent No. 5 for attaching the said three Bank accounts and recovering the amounts therein being EXHIBIT B, EXHIBIT B1 & EXHIBIT B2 hereto, with a direction to:

(i) Deposit sum of Rs. 45 lakhs in the Court.

(ii) Payment of Rs. 45 lakhs with interest @ 18% p.a. w.e.f. 30th August, 2012 till his payment is made.

(iii) Deposit of payment is made pending the disposal of the present Petition."

Mr. Shroff, learned senior counsel appearing on behalf of the petitioner submits that the relief in terms of prayers (a) and (b) has been granted in the sense the bank accounts have been released from attachment.

2. Now the only surviving contention is about the substantive relief and though the same is not claimed in that form and words, the prayer clause (d) would furnish a definite apprehension of the petitioner that the respondent No. 6 having not closed the proceedings under the scheme entitled The Service Tax Voluntary Compliance Encouragement Scheme, 2013, by issuing a declaration in terms of paragraph 107(7) thereof, the show cause notice which is issued and which is required to be adjudicated proceeds on a wrong and incorrect assumption. That adjudication will take place before a distinct adjudicating officer. He is not the authority in terms of the Scheme and that power is only vested in the respondent No. 6. Therefore, the respondent No. 6 be directed to act in terms of paragraph 107 of the Scheme and issue necessary declaration within the meaning of subpara (7) thereof.

3. Mr. Shroff specifically urges that the petitioner does not desire to interfere with the on-going proceedings and adjudication pursuant to the show cause notice dated 27th June, 2014.

4. However, the show-cause notice and particularly in paragraph No. 8 thereof has failed to take note of the petitioner''s request and as contained in the letters copies of which are at pages 130 and 132 of the paper-book. In the circumstances, in the absence of such a declaration as is required by the scheme, the Adjudicating Authority will proceed to recover, not only the duty amount, but interest and penalty. Therefore, the petitioner will not be in a position to urge during adjudication proceedings that any adjustments or appropriation ought to be made.

5. Mr. Jetly appearing for the Revenue on the other hand would submit that the petition as a whole has worked itself out. Now there is no attachment or freezing of the bank accounts. The petitioner''s apprehension that the show cause notice will not be decided in accordance with law has no basis. The authority will take

into consideration all prior payments and adjustments and make an order accordingly. In the circumstances, the writ jurisdiction should not be exercised and to assist a petitioner who decides to delay the proceedings.

6. After having heard Mr. Shroff at some length, we find that the show cause notice has been issued and is pending adjudication. The show cause notice itself recites as to how the liability under the Finance Act arises and to pay the service tax. The show cause notice recites at paragraph 5 as to how the petitioner-assessee has been continuously requested by letters and summons to produce various documents by the Department. The books of account and other documents which were relevant for the purposes of this scrutiny and verification, the details of the bank account could not be furnished and were rather not furnished to the satisfaction of the authorities. The Financial Consultant appeared before the authority and admitted pending service tax liability of Rs. 54.97 lakhs and that is recited in paragraph 6 of the show cause notice. Thereafter, the show cause notice refers to the pay orders forwarded by the banks to the Service Tax Department by debiting the amount available in the petitioner''s bank accounts. The application filed under the Scheme with the Department for the period July 2012 to December 2012 declaring service tax liability of Rs. 21,59,883/- is referred to in paragraph 6 of this show cause notice. Then the letter of 23rd December, 2013 of the petitioner requesting adjustment of an amount relating to 50% of the declared amount of Rs. 21,58,883/- is referred. The amount of Rs. 71,19,869/- recovered following the action under section 87(b) of the Finance Act, 1994, is specifically referred. The show cause notice in paragraph 7 analyzes the nature of the services rendered and the amounts which are required to be paid towards service tax, then, it is alleged that the assessee in paragraph 8 is supposed to have provided taxable service according to the Department in the sum of Rs. 9,54,78,961/- to his client. He charged and collected the accrued service tax thereupon, but has not discharged the tax liability amounting to Rs. 1,02,12,984/- for the period commencing from 1st July, 2012 to 31st August, 2013. The declaration under the Scheme in the sum of Rs. 21,59,883/- is specifically referred in this paragraph and which is for July 2012 to December 2012 under The Service Tax Voluntary Compliance Encouragement Scheme, 2013, and the request to adjust 50% of the amount against the amount credited by the bank to the service tax account following action under section 87(b) of the Finance Act, 1984. The service tax liability amounting to Rs. 60,39,927/- which is a figure determined after adjusting Rs. 1,07,99,942/- from the 50% payment under The Service Tax Voluntary Compliance Encouragement Scheme and that is stated to be liable for appropriation towards service tax liability.

7. We have no doubt that when the petitioner raises appropriate defences and files a reply to the show cause notice or if it is already filed during the course of his submissions which could be oral, he will be able to point out that he had availed of The Service Tax Voluntary Compliance Encouragement Scheme and complied with the same particularly of the requirement or procedure for making declaration of the payment of tax dues. The authority designated under the

Scheme has acknowledged the declaration, that the petitioner has in terms of the declaration made the payment and furnished details to the Designated Authority under the Scheme along with a copy of the acknowledgement issued to him, but the Designated Authority has failed to issue an acknowledgement of the discharge of such dues and as is required. In other words, that authority having not yet issued the acknowledgement of discharge in such form and in such manner as may be prescribed does not mean that the petitioner has failed to discharge his liability and, therefore, the demand should not be sustained. In other words, he can also rely upon the stand taken and particularly in the letters at Annexures G and H dated 23rd December, 2013 and 27th June, 2014. If that certificate has not been issued and in terms of the paragraph, it would be open for the petitioner to urge that failure on the part of the authority to issue such a declaration should not visit him with any tax demand including of interest and penalty.

8. All the above contentions and others which can be raised in law can always be raised during the course of the proceedings and merely because the show cause notice is going to be adjudicated by a distinct authority does not mean that the petitioner is prevented from canvassing appropriate pleas. If any decision is taken on the show cause notice and which is adverse to the interest of the petitioner, then, while challenging and impugning the same, the petitioner can always raise such pleas as are permissible in law, including by inviting the attention of the authority to the Scheme and its clauses or paragraphs and subparagraphs. In the circumstances, we do not see why the petition should be kept pending and entertained any further. Having clarified that all contentions can be raised and in the manner set out above, the Writ Petition is disposed of. No order as to costs.