(2016) 04 BOM CK 0145

In the Bombay High Court

Case No : Writ Petition No. 1088 of 2016

Cleartrip Private Ltd. APPELLANT

Vs

The Union of India RESPONDENT

Date of Decision : 26-04-2016

Acts Referred:
Finance Act, 1994 — Section 73, 73A, 83, 89, 91

Citation : (2016) 288 CurTR 515

Hon'ble Judges : S.C. Dharmadhikari and Dr. Shalini Phansalkar Joshi, JJ.

Bench : Division Bench

Advocate : Mr. V. Sridharan, Sr. Counsel, a/w. Mr. Prakash Shah, i/by M/s. PDS Legal, for the Petitioners; Mr. V.M. Thorat, a/w. Ms. Pooja Thorat, i/by Ms. Annie Fernandes, Advocates, for the Respondent Nos. 2 to 4

Final Decision : Disposed Off

Judgement

1. By this Petition, under Article 226 of the Constitution of India, the Petitioners pray for a direction to the Respondents by themselves, their servants, agents and subordinates from taking or initiating any coercive proceedings for recovery of the amount, styled as ''Service Tax'', under the provisions of Finance Act, 1994, without following the mandate of Section 73 and/or 73A thereof and arresting the Directors or employees of Petitioner No. 1, including Petitioner Nos. 2 and 3, under Section 91, read with Section 89(1)(ii) of the Finance Act, read with Section 83 thereof, and further read with Section 9AA of the Central Excise Act, 1944.

2. This Petition was placed before this Court earlier. Petitioner No. 1 is a Company incorporated under the Indian Companies Act, 1956 and, inter alia, engaged in providing Air Travel Agents'' services, Rail Travel Agents'' services, Tour Operators'' services and is registered under the Service Tax Rules, 1994. The claim of the Petitioners is that they are duly discharging their liability to pay service tax. Petitioner Nos. 2 and 3 are the Executive Vice President-Finance and the Deputy General Manager-Finance of Petitioner No. 1-Company. Respondent

Nos. 2 to 6 are Officers of Respondent No. 1, discharging the duties and exercising the jurisdiction under Chapter V of the Finance Act, 1994, Service Tax Rules, 1994 and Central Excise Act, 1944 and Rules framed thereunder.

3. The Petitioners claim that they carry on a legitimate business activity by arranging for hotel accommodation for those travelling and that is how they provide online air, rail, cab and hotel booking through a website www.cleartrip.com. Petitioner No. 1-Company states that it allows its customers, inter alia, to book hotels through its online portal. The Petitioners enumerate their business activities, in detail, in several paragraphs of the Petition, commencing from Paragraph No. 4.

4. It is stated that the modality and methodology is that the Petitioners do not operate any hotels nor have any resorts or other accommodations belonging to themselves. They facilitate customers/travelling public by arranging for such hotel accommodation and with amenities based on the information, which they have obtained from the hoteliers. As far as the checking-in of the tourists and travellers is concerned, that is a matter between the hoteliers and them entirely. There is billing done, in which whatever services are rendered by hoteliers and resort owners, they are charged for, including the applicable service taxes. As far as the Petitioners are concerned, they have submitted such documents as would enable the authority to appreciate and understand their business activity, distinct from the hoteliers. The Petitioners are, in their bills, not charging or recovering any amount representing service tax from the customers, who had booked the rooms through their portal.

5. The Petitioners'' apprehension is that, during the visit by Respondent No. 2, they were informed that their counterpart in Ludhiana has arrested one of the officials of Make-My-Trip for not depositing the service tax collected from the customers, who had booked the room on its portal. In the light of the same and the Petitioners, being in the similar business, following identical process, Respondent No. 2 coerced the Petitioners to deposit the service tax, which they have collected but failed to deposit on behalf of the hoteliers.

6. The Petitioners state that they provided clarification, but they apprehend that it would be the stand of the Respondents that they would not accept the version, nor follow any due process of law, in the event, this version or stand of the Petitioners found not acceptable. They apprehend that similar coercive measures, as were informed in relation to Make-My-Trip, would be initiated as against them. That is how they rely on the e-mails, copies of which are annexed at Exhibits "E-1" to "E-3" of the paper-book, and those e-mails are emanating from Respondent No. 2, which, according to the Petitioners, substantiate their apprehension. They have also relied upon para 31 of the Petition.

7. It is the contention of the Petitioners'' Senior Counsel that, without issuing any show cause notice and without any adjudication, but on the assumption that the Petitioners had collected the amount representing service tax and not deposited

the same with the Government Treasury, that these coercive measures, including arrest of the employees of the Petitioners and Petitioner Nos. 2 and 3, would be effected.

8. Reliance is placed upon several provisions in the Service Tax Act and Finance Act, 1994 and the Rules framed thereunder, so also a compilation containing Judgments, which would, according to the Petitioners, demonstrate that no law would permit initiation of coercive measures, particularly recovery by forceful means, unless there is a prior ascertainment and crystallisation of the dues and taxes.

9. It is on such Petition that, initially, on 25th January 2016, the Division Bench of this Court, of which one of us (Coram : S.C. Dharmadhikari, J.) was a party, passed an ad-interim order in terms of prayer clause (c) and that order has been continued.

10. An affidavit-in-reply has been filed on behalf of Respondent Nos. 2, 3 and 4. In that affidavit-in-reply, the Petitioners'' activities have been referred to in detail. The claim of the Department is, though the Petitioners pay service tax as Tour Operator in some cases and transactions, they have not paid the service tax on the gross amount charged to the customers and did not include the amount of commission of sub-agents collected and paid by the Petitioners to such sub-agents. In some cases, Petitioner No. 1-Company is collecting service tax on behalf of the hoteliers, where, in fact and in reality, no tax is attracted under the provisions of Finance Act, 1994 or under any other laws. Thus, the collection of service tax more than permissible and passed over to the hoteliers would attract several steps and measures under the law.

11. The affidavit explains as to how a summons was issued to Petitioner No. 1-Company to appear before Respondent No. 4 and, accordingly, Petitioner No. 3-Vikas Deshmukh appeared and his statement was recorded. The emphasis, throughout in the affidavit-in-reply, is that the Petitioner No. 1-Company renders services and they cannot be distinguished from that of the hoteliers and resort owners. Else, they would not have collected the service tax and included that component in the invoices and bills.

12. There is a rejoinder affidavit filed to the affidavit-in-reply and which reiterates the contents of the Petition.

13. After the matter was heard earlier, we enquired from Mr. V.M. Thorat, learned counsel appearing for Respondent Nos. 2 to 4, as to what would be the stand of the Respondents and he, on instructions, has stated before us that the Department has not enquired and/or investigated into the affairs of the Petitioner No. 1-Company, except recording of the statements and producing affidavits of the Officers. The Department is empowered to conduct thorough enquiry and investigation, which is stalled by the absence of the Petitioners. The Department will complete the enquiry and, if it strongly believes, with supporting reasons and documents, that a prosecution is required to be launched or could be launched,

only then, necessary steps for prosecution would be taken. Merely because there is a provision for prosecution, the same will not be resorted to.

14. Ordinarily, we would not have been required, with this clarification, to pass any order. However, the Petitioners'' apprehension is that on par with some other cases, their officers will also be picked-up. The apprehensions are that, so long as there is an ad-interim protection from this Court, the Respondents would not take such steps, like, arresting the Officers. However, the moment this Court grants any such concession, as is sough in the statements which Mr. Thorat makes on instructions, the Petitioners would be proceeded against and coercively.

15. Though extensive arguments were canvassed and the compilation of case laws was also tendered, we do not think that, in the facts and circumstances of the present case, a larger question or issue will be required to be gone into.

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 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 cognisable 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.

17. Once we also note the stand of the Respondents as not precipitating the matter particularly harming the life and liberty of those, who are in-charge of Petitioner No. 1-Company, then, all the more, any detailed discussion by

referring to the arguments in-depth, consideration of the case law becomes unnecessary.

18. The Writ Petition is disposed of.

