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IN THE HIGH COURT OF DELHI AT NEW DELHI

% Reserved on : 21.04.2022

Pronounced on : 25.04.2022

+ CRL.M.C. 1708/2022

BHAVYA BISHNOI

..... Petitioner

Through: Mr.Nidhesh Gupta, Sr. Advocate with  
Mr. Vriti Gujral, Mr. Anurag Singh  
and Mr. Naveen Kumar, Advocates.

versus

INCOME TAX OFFICE, THROUGH  
SHREYANS GUPTA, DDIT(INV)

..... Respondent

Through : Mr.Vibhooti Malhotra, Mr.Shailendra  
Singh and Mr.Ekansh Dubey,  
Advocates for Income Tax  
Department.

**CORAM:****HON'BLE MR. JUSTICE ANOOP KUMAR MENDIRATTA****ORDER****ANOOP KUMAR MENDIRATTA, J.****CRL.M.C. 1708/2022 & CrI. M.A. No.7317/2022 (stay)**

1. By way of the present petition under section 482 of the Code of Criminal Procedure, petitioner seeks quashing of complaint under Section 190 (a) read with Section 200 Cr.P.C. for offence of Black Money (Undisclosed Foreign Income and Assets and Imposition of Tax Act, 2015 for A.Y 2016-17) (hereinafter referred to as BMI Act) and order dated 05.08.2021 passed by learned ACMM, Special Acts, Central District, Tis



Hazari and sanction order dated 12.07.2021 passed under Section 55 of BMI Act.

2. Vide a separate application CRL. M.A. 7317/2022, the petitioner seeks stay of the proceedings in Complaint Case No. 1964/2021 filed by the respondent before the learned ACMM, Special Acts, Central District, Tis Hazari Courts.

Apart from relying upon the contentions raised in the present petition filed under Section 482 of Cr.P.C., it has also been mentioned that this court in W.P.(C) No. 142/2020 *vide* order dated 04.08.2021 as well as in LPA no. 236/2021 *vide* order dated 09.08.2021, permitted the petitioner to travel to USA for a Masters course in Public Administration (MPA) at the Harvard Kennedy School, John F. Kennedy School of Government, Cambridge, Massachusetts, United States of America (USA). It is also prayed by the counsel that in case this Court is not inclined to stay the proceedings, petitioner may be granted exemption from appearance since he is continuing his studies in USA.

3. The application for stay of proceedings pending before the learned ACMM has been vehemently opposed on behalf of respondent and time has been sought to file reply.

4. In brief, a complaint under Section 50 of the BMI Act was filed for assessment year 2016-17 against the petitioner/accused, alleging that he has not disclosed about his financial interest in the bank accounts held by him with the 'Investec Bank' (Channel Island) Limited" in its Jersey Branch for the ITR filed by him for the assessment year 2016-17.



5. Learned ACMM observed that a *prima facie* case is made out for the offence under Section 50 of the BMI Act and accordingly, after taking the cognizance, issued summons to the petitioner *vide* order dated 05.08.2021.

6. The case of the petitioner is that a search and seizure operation was conducted by the Income Tax Department at the residential premises of the petitioner and his family members and at the time of search proceedings, the statements of the petitioner and his family members were recorded under Section 132 (4) of the Income Tax Act in between 23.07.2019 to 27.07.2019.

7. Further, on 22.08.2019, summons were issued to petitioner under Section 131 (1A) of the Income Tax Act and in compliance of which, the petitioner duly appeared before DDIT (INV.) Unit-4(3), New Delhi and his statement was recorded under Section 138 (1) of the Income Tax Act. Thereafter on 29.01.2021, almost after 1 ½ years of the search and seizure, a show cause notice was issued to petitioner to show cause as to why statutory sanction under Section 55 of the BMI Act and Section 50 of the BMI Act should not be granted.

8. On 24.02.2021, the petitioner filed its reply to show cause notice dated 29.01.2021. It is submitted that the petitioner did not hold any interest in the said bank accounts and further clarified that he is only the discretionary beneficiary in the trust and does not have any right or interest in the company nor in the bank account of the said company. Further, as per the account opening form, the said account was opened on 25.02.2015 in financial year 2014-15 and in the said financial year, petitioner was a non-resident and was not bound to disclose the relevant column in the Income



Tax Returns that were filled as per the requirement and intention reflected in aforesaid forms.

9. However, nothing was heard from the authorities after the submission of the reply. Further, the pendency of the present proceedings came to the knowledge of petitioner somewhere in September to October, 2021, when the respondent-authorities disclosed regarding filing of complaint against the petitioner and the summons were received by the petitioner's father lately in the month of September/October, 2021.

10. It is submitted by learned counsel for the petitioner that the sanction order dated 12.07.2021 passed under Section 55 of the BMI Act for initiating prosecution of the petitioner is bad in law and not a valid sanction order, as the same is not in terms of Section 55 of the Act. The present proceedings are stated to be coercive for causing harassment to the petitioner.

11. It is next submitted that the assessment proceedings under Section 10 of the BMI Act against the petitioner is pending and the authorities are yet to crystallize and quantify the assets and/ or income received from such assets as the petitioner has not received any income or any benefit therefrom.

12. The proceedings before the learned ACMM is stated to be premature and an abuse of process of law. It is further contended that even the assessment proceedings completed by respondent under the Income Tax Act, 1961 did not find any adverse findings against the petitioner. Further, it is the requirement that before initiating any prosecution proceedings, one needs to satisfy that there are undisclosed assets located outside India as per the definition of Section 2(11) of the Income Tax Act. It is further pointed out



that the mandate granted under Section 2 (11) was substituted by Act 13 of 2018 w.e.f. 01.04.2018 and as per sub-clause (2) of the Section, sanction can be passed only to the authorities mentioned in the sub-clause (1) and not to any other authority, while sanction in the present case was passed to respondent herein, which is not the authority mentioned in sub-clause (1) of the Act.

13. It is further submitted that respondent-authorities, in sanction order relied upon a notification 39 of 2017 while passing sanction under Section 55 of the BMI Act which is fundamentally incorrect as the said provision was substituted in the year 2018. It is further contended that the respondent failed to acknowledge the fact that the foundation is the discretionary trust, which means that all that a person on being nominated as beneficiary, an expectancy or anticipation of hope of distribution in his favour, is subject to exercise of the absolute unfettered discretion for 'distribution' by the trustees and nothing more.

14. It is vehemently submitted that there is no mention and/or averment with respect to any benefit derived from such alleged beneficiary and the beneficiary trust deed is stated to have been settled with the petitioner who was just two years of age on 12.06.1995. It is urged that no commission of any offence is disclosed. The petitioner is at present stated to be a student of 29 years of age, with his date of birth being 16.02.1993.

15. Reliance is further placed upon W.A No 1125 of 2018 titled as '*Karti P Chidambaram vs The Principal Chief Commissioner of Income Tax & Ors*'. Reference is also made to a judgment passed by the Hon'ble Supreme Court in '*Commissioner of Wealth Tax, Rajkot vs. Estate of Late HMM*



*Vikram Sinhji of Gondal' 2015 (5) SCC 666*, wherein in paras 12 and 13, it has been observed as under:

*“12. The High court, however, did not agree with the Tribunal's view on consideration of the relevant clauses of the U.K. Trust Deeds and various judgments of this Court as well as some High Courts and held that there were distinguishing features for assessment years under appeal and the previous order of the Settlement Commission and the earlier judgment of this Court.*

*For the assessment years under consideration in these appeals, the High Court noted the following distinguishing features, viz.*

- (i) the assessee has not admitted having received the income;*
- (ii) the assessee has not received the said income; and*
- (iii) the assessee has not shown as taxable income in the returns of all the years under appeal.*

*Having observed the above distinguishing features, the High Court was also of the view*



*that on interpretation of the relevant clauses of the deeds of settlement executed in U.K., character of the trusts appears to be discretionary and not specific.*

*13. A discretionary trust is one which gives a beneficiary no right to any part of the income of the trust property, but vests in the trustees a discretionary power to pay him, or apply for his benefit, such part of the income as they think fit. The trustees must exercise their discretion as and when the income becomes available, but if they fail to distribute in due time, the power is not extinguished so that they can distribute later. They have no power to bind themselves for the future. The beneficiary thus has no more than a hope that the discretion will be exercised in his favour.”*

16. It is also contended that the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Act, 2015 has introduced a tax compliance provision under Chapter VI of the Act and the Black Money (Undisclosed Foreign Income and Assets) and Imposition of Tax Rules, 2015 have been notified. Further, in regard to the scheme, queries have been received from the public about the scope of the scheme and the procedure to be followed and the Board has considered the same and decided to clarify the points raised by issue of a circular in the form of questions and answers, in



which question No. 31 regarding the eligibility of a beneficiary for declaration under Section 59 of the Act, reads as follows :

***“Question No. 31: A person is a beneficiary in a foreign asset. Is he eligible for declaration under section 59 of the Act?”***

*Answer: As far as ownership is concerned, as per section 2(11) of the Act “undisclosed asset located outside India” means an asset held by the person in his name or in respect of which he is a beneficial owner. The definition of “beneficial owner” and “beneficiary” is provided in Explanation 4 and Explanation 5 to section 139(1) of the Income-tax Act, respectively (which is at variance with the determination of beneficial ownership provided under Rule 9(3) of the PMLA (Maintenance of Records) Rules, 2005). Therefore, for the purpose of the Act “beneficial owner” in respect of an asset means an individual who has provided, directly or indirectly, consideration for the asset for the immediate or future benefit, direct or indirect, of himself or any other person. Further, “beneficiary” in respect of an asset means an individual who derives benefit from the asset during the previous year and the*



*consideration for such asset has been provided by any person other than such beneficiary. Therefore, as per the Act the beneficial owner is eligible for declaration under section 59 of the Act. There may be a case where a person is listed as a beneficiary in a foreign asset, however, if he has provided consideration for the asset, directly or indirectly, he will be covered under the definition of beneficial owner for the purposes of the Act.”*

17. In Question No. 13, it has been reiterated as follows :

***“Question No.13: How would the person know that the Government has received information of an undisclosed foreign asset held by him which will make the declaration ineligible?”***

***Answer:*** *The person may not know that the Government has information about undisclosed foreign asset held by him if the same has not been communicated to him in any enquiry/proceeding under the Income-tax Act. After the person has filed a declaration, which is to be filed latest by 30th September, 2015, he will be issued intimation by the Principal Commissioner/Commissioner by 31th October,*



2015, whether any information has been received by the Government and consequently whether he is eligible to make the payment on the declaration made. If no information has been received up to 30th June, 2015 by the Government in respect of such asset the person will be allowed a time upto 31st December, 2015 for payment of tax and penalty in respect of the declared asset. There may be a case where person makes declaration in respect of 5 assets whereas the Government has information about only 1 asset. In such situation the person will be eligible to declare the balance 4 assets under Chapter VI of the Act. In such case the declarant, on receipt of intimation by the Principal Commissioner/Commissioner, shall revise the declaration made within 15 days of such receipt of intimation to exclude the asset which is not eligible for declaration. Tax and penalty on the eligible assets under the Act shall be payable in respect of the revised declaration by 31st of December, 2015. In respect of the ineligible assets provisions of the Income-tax Act shall apply. ...”



18. On the other hand, contentions raised by learned counsel for the petitioner have been vehemently opposed by learned counsel on behalf of the Income Tax Department, who appears on advance notice. Learned counsel, apart from seeking time to file reply, has drawn attention of this court to the returns filed for the relevant year and vehemently contended that the proceedings have been taken in accordance with the provisions of Section 50 of the BMI Act. It is submitted that in the relevant returns for the year 2016-17, the relevant foreign bank account had not been disclosed and reliance is placed upon proviso (4) and explanations 4 and 5 to Section 139 (1) of the Income Tax Act. Further time has also been sought to file reply with reference to the competency of the authority to grant sanction under Section 55 of the BMI Act which has also been challenged in the present proceedings.

19. I have given considered thought to the contentions raised.

Since the complaint before the learned ACMM has been filed for the alleged commission of offence under Section 50 of BMI Act, the provisions of the same are relevant to be noticed hereinafter :

*“Section 50... Punishment for failure to furnish in return of income, any information about an asset (including financial interest in any entity) located outside India*

*50. If any person, being a resident other than not ordinarily resident in India within the meaning of clause (6) of section 6 of the Income-tax Act, who*



*has furnished the return of income for any previous year under sub-section (1) or sub-section (4) or sub-section (5) of section 139 of that Act, willfully fails to furnish in such return any information relating to an asset (including financial interest in any entity) located outside India, held by him, as a beneficial owner or otherwise or in which he was a beneficiary, at any time during such previous year, or disclose any income from a source outside India, he shall be punishable with rigorous imprisonment for a term which shall not be less than six months but which may extend to seven years and with fine.”*

20. Thus, in order to attract the provisions of Section 50 of BMI Act, the following requirement appear to be mandatory :

*“a. A person being a resident other than not ordinarily resident in India, within the meaning of clause 6 of Section 6 of Income Tax Act.*

*b. Such person has furnished the Return of Income for any previous year under sub section (1) or sub section (4) or sub section (5) of section 139.*

*c. Willfully fails to furnish in such return any information relating to an asset (including financial interest in an entity) located outside India,*



*d. Held by such person, as a beneficial owner or otherwise or in which he is a beneficiary, at any time during such previous year.”*

21. The contention of learned counsel for the petitioner is that the petitioner was a minor at the time of investment i.e. only about two-three years and the petitioner's grandfather made investment in the said company/trust. Further even assuming the allegations of the complainant to be true, the petitioner was required to disclose the said details in the ITR, as the account was opened in the year 2015 on 25.05.2015 (Financial Year 2014-15) i.e. assessment year 2015-16. Further as per definition of 'Previous Year' under Section 2 (9) of the BMI Act, there was no requirement, at that stage to disclose the same. Further, it has also been contended that petitioner was not benefitted by any benefit and has not received even a single penny. Reference was also made to the provisos to Section 139 along with explanation 4 and 5 of the Income Tax Act. It is contended that the petitioner, on being nominated as beneficiary, an expectancy or anticipation of hope of distribution in his favor, existed and nothing more and Revenue authorities are yet to quantify the assets and/or income received from such assets under assessment proceedings Under Section 10 of BMI Act.

The contentions raised by counsel for petitioner appear to be forceful and carry merit subject to the reply to be filed on behalf of respondent.

23. Considering the aforesaid aspects and in the totality of the facts and circumstances, it is directed that the proceedings before the learned trial court shall be subject to the final orders passed in the present petition.



However, I am not inclined to stay the proceedings before the learned ACMM, at this stage and an opportunity is granted to the respondent to file a reply on merits as well as on the point of grant of sanction under Section 55 of BMI Act. Reply be filed on behalf of the respondent within 04 (four) weeks with advance copy to learned counsel for the petitioner. Rejoinder, if any, be filed within 04 (four) weeks thereafter with advance copy to counsel for the respondent.

Further, counsel for petitioner has vehemently prayed that petitioner be granted exemption from appearance before learned Trial Court in case the proceedings are not stayed, since the petitioner is a student undertaking studies at Harvard Kennedy School, John F. Kennedy School at USA. The proceedings initiated on complaint are based primarily upon documents and identity of petitioner is not disputed. Exemption if granted shall not prejudice the complainant in any manner. Learned ACMM may consider granting an exemption from personal appearance to the petitioner through Authorized Representative in accordance with law, in case an appropriate application in this regard is moved before the learned ACMM.

24. Nothing stated hereinabove shall tantamount to expression of opinion on merits.

25. List on 28.07.2022.

26. A copy of this order be forwarded to learned Trial Court for information and compliance.

**(ANOOP KUMAR MENDIRATTA)**

**JUDGE**

**April 25, 2022**

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