THE HIGH COURT OF MADHYA PRADESH: BENCH AT INDORE

DIVISION BENCH

Writ Petition No.10329/2018

Ayush Kataria s/o Ashwin Kumar Kataria

vs.

Union of India and three others

Coram :

Hon'ble Shri Justice P.K. Jaiswal
Hon'ble Shri Justice S.K. Awasthi

Shri Prateek Maheswari, learned counsel for the petitioner.

Shri R.L. Jain, learned Senior Advocate with Ms. Veena Mandlik, learned counsel for the respondents/Income Tax Department.

O R D E R

(Passed on 09 / 07 /2018)

Per: S.K. Awasthi, J.

1. The present petition has been filed for issuance of a writ of habeas corpus directing the respondents to produce/release Ashwin Kumar Kataria, the father of the petitioner (herein after referred to as "the detenu"), who is said to have been detained in civil prison by the respondent No.3 in purported exercise of his jurisdiction under Rule 76 of Second Schedule of the Income Tax Act 1961.

2. The detenu has been engaged in cotton business at Khandwa, M.P. Allegedly because of heavy losses due to non-recovery from the debtors in tooth of global recession, he could not have paid the income tax dues to the extent of a sum of

Rs.2 Crores 78 Lacs. However, the property of the detenu situated at Khasra No.864/12, Pandhana Road, Khandwa (M.P.) admeasuring 0.0405 hectares was attached by the Income Tax department. It is stated that at different times after attachment of the property efforts were made by the department for sale of the property, but the efforts made by the department failed. In the meantime, the assessment of the income tax was challenged by the father of the petitioner before different forums, but the said assessment was finalized. All of a sudden, on 10.2.2018, the father of the petitioner-Mr.Ashwin Kataria was arrested by the respondent No.3/Income Tax Authority and brought him to Indore Office and then he was committed to civil prison. However, while an arrest was made, no notice, as required under Rule 73 of Second Schedule of the Income Tax Act, was served on the father of the petitioner. The arrest of Mr.Ashwin Kataria was made at Akola, Maharasthra, but no details of his arrest were provided to the petitioner or his family members. While the recovery proceedings were under progress and the property belonging to the father of the petitioner was attached, then there seems to have been no need of arrest or detention of the father of the petitioner.

3. It is further submitted by the learned counsel for the petitioner that father of the petitioner has not been produced before the nearest Magistrate within the period of 24 hours, therefore, the provision of Section 57 of Code of Criminal Procedure, 1973 has not been complied with. Rule 76 of the Second Schedule of the Income Tax Act provides authority to the Tax Recovery Officer to release the detenu for a period of 15 days upon furnishing security of his appearance, in case arrears are not so satisfied, but the respondent No.3 did not

provide any such release after appearance of the detenu. The father of the petitioner has been illegally arrested by the respondents for a period of long time curtailing his fundamental rights contained under Articles 21 and 22 of the Constitution of India and he has been detained in the district jail.

4. Per contra learned counsel for the respondent Nos. 1 to 3 submitted in their reply that the defaulter-Ashwin Kataria has legally detained in prison, as per “Part V of the Second Schedule” of the Income Tax Act, 1961. Proper procedure as prescribed in the Act has been followed and the reasons for detention in prison have also been duly recorded. Rs.6,16,26, 393/- of tax is due on the defaulter and he has falsely claimed that he had no means to make payment for the outstanding demand because he has not only purchased an immovable property but also sold the same to one Meghraj Jain in the year 2015 without utilizing the same for payment of his dues. The defaulter has remained non-compliant, non-cooperative and absconding, all the service of the statutory notices were made through service by affixture, therefore, the warrant of arrest has been issued against the defaulter and the reasons for the detention in prison have also been recorded. The defaulter has been sent to civil prison for 180 days not a criminal prison and this fact has clearly been mentioned in the detention order dated 23/02/2018. The grounds taken by the petitioner is false, baseless and misconceived, therefore, this petition is deserves to be rejected.

5. We have heard the learned counsel for the parties at length and perused the record.

6. It is not disputed that the detenu has not paid the income

tax dues of his business to the extent of a sum of Rs. Rs.6,16,26, 393/-. Therefore, his land situated at Khasra No.864/12, Pandhana Road, Khandwa (M.P.) admeasuring 0.0405 hectares was attached by the Income Tax department and an attempt was made for sale of the aforesaid property, but the department could not succeed. It is not disputed that before a person can be arrested and detained, the provisions contained in the Rule 73 of Second Schedule are required to be complied with.

7. In the present case notice issued under Rule 73 of the Second Schedule and was served on the father of the petitioner in the year 1998. The second notice (Annexure R-1) was issued by the Tax Recovery Officer on 20.12.2017, which was served by substituting service when even after the service of notice, the father of the petitioner did not pay the arrears of the income tax then warrant of detention in civil prison has been issued, which has been served on 10.2.2018 and the father of the petitioner was remanded to the dis trict jail in default of payment of the income tax.

8. From the perusal of the record it appears that the detenue is residing at Akola and he neglect the service of notice, therefore, service of notice were made through affixure. Even after the service of notice, he deliberately remained non-cooperative and absconding. T.R.O. also found that after the attachment of the aforesaid land of the detenue he objected the execution of the certificate and transfer of his property. He refuses to pay the arrears of amount of tax, therefore, a show cause notice was issued against him under Rule 73 of Second Schedule of the Income Tax Act.

9. As apparent from the impugned order that during the auction proceedings the respondent come to the notice that the detenue was making hinderance in the auction proceedings and he was objected the execution of the certificate and he transferred all his property. He refuses to pay the arrears amount of tax, therefore, a show cause notice ITCP dated 28/12/2017 was issued under Rule 73 of Second Schedule of the Income Tax Act, which was served through by affixure. He has not replied the notice, then warrant of arrest was issued against the detenue for the recovery of the tax amount in civil prison, which has been served on 10/02/2018 and since the detenue was remanded to the District Jail in default of payment of income tax.

10. As per Rule 73 of the Second Schedule of the Income Tax Act, the Recovery Officer is having discretion to pass an order that detenue be detained in the custody and under the aforesaid powers the TRO has issued detention warrant against the detenue.

11. The father of the petitioner has been arrested under the warrant of the Income Tax Department and after the arrest he would produce before him by the Police Authorities and he was sent for safe custody till the finalisation of the investigation and after that on 23/02/2018, the detention order was passed, therefore, there was no need to produced him before the Magistrate, under the provision of Section 57 of the Cr.P.C.. Proceedings done by the TRO is under the statutory provisions and therefore, no violation has been made under Article 21 of the Constitution of India.

12. In the considered view of this Court, Article 21 of

Constitution of India has no application in the matter because there is specific provisions have been made for recovery of tax dues. In the case of **Col. Dr. B. Ramachandra Rao v. State of Orissa**, reported as **AIR 197 SC 2197** the apex Court, inter alia, observed that a writ of habeas corpus is not granted where a person is confined in jail custody by a competent Court except unless the order prima-facie is without jurisdiction or wholly illegal. In the present matter Tax Recovery Officer followed the procedure established under the provisions of Income Tax Rules before directing arrest of the detenu for the recovery of arrears of tax, therefore, the judgment relied by the counsel for the petitioner in the case of **Gajendra Kumar Banthia vs. Union of India** reported in **1996 Vol. 222 Income Tax Reports 632** is not applicable in the circumstances of the present matter.

13. In the light of the above, we do not find any substance in the present petition. Accordingly, the present writ petition stands dismissed.

No costs.

(P.K. Jaiswal)
Judge

(S.K.Awasthi)
Judge

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