

IN THE HIGH COURT AT CALCUTTA
Civil Appellate Jurisdiction
Appellate Side

Item No.37

Present :

The Hon'ble Justice T. S. Sivagnanam

And

The Hon'ble Justice Hiranmay Bhattacharyya

M.A.T 1233 of 2021

With

I.A. CAN 1 of 2021

Adhunik Corporation Limited & anr.

Vs.

Superintendent, Directorate General of Goods and Services Tax

Intelligence, Kolkata Zonal Unit & ors.

For the appellants : Mr. Anil Kumar Dugar,
Mr. Rajarshi Chatterjee.

For the Union of India : Mr. Y. J. Dastoor, Id. A.S.G.,
Mr. Siddhartha Lahiri.

For respondent nos.1 to 4 : Mr. Somnath Ganguly,
Mr. Sukalpa Basu,
Ms. Sabnam Basu.

Heard on : December 17, 2021.

Judgment on : **December 17, 2021.**

This appeal by the assessee is directed against an order dated 4th October, 2021 passed by the Learned Single Bench in W.P.A. No.13009 of 2021. The appellants / writ petitioners had challenged the order of provisional attachment passed by the respondent authorities dated 20th January, 2021 in exercise of their power under Section 83 Central Goods and Services Tax Act, 2017 (hereinafter referred to as the “CGST Act”). The appellants had filed the writ petition after nearly seven months from the date of which the order of provisional attachment was passed but their case was that they sought for lifting the order of attachment but the authorities did not consider the same. Therefore, they had approached the learned Writ Court. The appellants have prayed for appropriate interim orders to protect their business activities. The learned Single Bench was not inclined to grant any interim protection and directed affidavit-in-opposition be filed by the respondents. Aggrieved by such order, the appellants are before us.

We have heard Mr. Dugar, learned counsel for the appellants and Mr. Somnath Ganguly, learned standing counsel for the respondent nos.1 to 4. The learned counsels of either sides submitted that the legal issue which is involved in the writ petition is the validity of the order of provisional attachment passed under Section 83 of the CGST Act and

they are agreeable that the main writ petition itself is disposed of at this stage in this appeal because the appeal is against an order refusing to grant appropriate interim protection. Placing the submission on record, we proceed to decide the main writ petition as well.

The respondent authorities addressed the State Bank of India, the banker of the appellants by letter dated 20th January, 2021. The said letter carries a heading “*Provisional attachment of property under Section 83 of the CGST Act, 2017*”. The letter states that proceedings have been launched against the assessee under Section 67 of the CGST Act to determine the tax of any other amount due from the said person and that information has been received by the Department that the assessee has other accounts in the State Bank of India, CAG Kolkata Branch and in order to protect the interest of revenue and in exercise of powers conferred under Section 83 of the CGST Act, the authority provisionally attached the bank account mentioned in the said communication. Thereafter, summons under Section 70 have been issued to the Director of the appellant no.1 and the matter has been proceeding and in the meantime, the appellants have deposited a sum of Rs.10 lakh vide deposit payment receipt dated 1st February, 2021. The appellants submitted a representation dated 2nd February, 2021 stating

that without going into the merits of admissibility or inadmissibility of the alleged ITC, they contended that on account of attachment of the bank account, they are unable to run their business and they are passing through acute financial crunch owing to the Covid-19 pandemic and in the said letter, they agreed to pay a sum of Rs.10 lakhs and specifically mentioned that if any further demand will be found, then it will be beyond their financial capability and will cause grave hardship.

Subsequently, the appellants submitted another representation dated 25th March, 2021 to the authorities of the DGGI stating that pursuant to the search conducted on 7th January, 2021, there was nothing seized from the place of business of the appellants and thereafter, statements have been recorded and the authorised representative of the appellants had assured to produce documents which include, ledger copies, bank statements, consignment notes, etc. Further, the appellants stated that the transactions are genuine in view of the fact that they have received the goods against documents and after receiving the goods they used the same in manufacture of finished goods and the finished goods have been cleared on payment of appropriate tax / duty and such payments were made through banking challans to the suppliers.

Further, it is stated that the bills for the transporters were also paid through banking channel and reiterated further that transactions are genuine.

With the above statements, they sought for revoking the order of attachment. The respondent authorities by communication dated 14th June, 2021 rejected the request for release of the attachment of the bank account but the reasons stated in the said communication is that only Rs.10 lakhs has been paid by the appellants against the irregular input tax credit amount deducted to the tune of Rs.83.79 lakhs approximately as per the proceedings initiated under Section 67 of the CGST Act. Further, the respondent quoted the guidelines issued by the GST Policy Wing for provisional attachment of property. This communication was put to challenge by the appellants.

The undisputed fact is that the proceedings under Section 67 of the CGST Act has been concluded and according to the learned senior standing counsel for the respondent nos.1 to 4, the matter is being processed and ultimately will result in issuance of the show cause notice for which statute provides for sufficient time of four years to the

department. Therefore, it is submitted that once the order has been passed under Section 83 provisionally attaching the bank account of the appellants, it should continue till the matter is taken to the logical end.

The learned counsel appearing for the appellants had submitted that this submission made on behalf of the respondent does not reflect the correct legal position. From the several decisions of the various High Courts referred to and relied upon, it would be sufficient to rely upon the decision of the Hon'ble Supreme Court in the case of *Radha Krishan Industries Vs. State of Himachal Pradesh* reported in *[2021] 127 taxmann.com 26 (SC)*. In the said decision, it has been held that the power to order a provisional attachment of property of a taxable person including a bank account is draconian in nature and exercise of power for ordering provisional attachment must be preceded by formation of an opinion by the Commissioner that it is necessary to do so for the purpose of protecting interest of Government revenue. It has been held that Section 83 indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the

attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Further, it has been held that formation of the opinion must be based on tangible material, which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue. Further, it was pointed out that a provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystalized. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion is not permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power.

It was further pointed out that under Section 83, the order of provisional attachment may be passed during the pendency of any proceeding under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74. Noting the fact of the said case, where a final order of attachment was passed under Section 74, it was held that order of provisional attachment must cease to subsist. Applying the legal principles laid down in *Radha Krishan Industries (supra)* to the case

in hand, we necessarily hold that as and when the proceedings under Section 67 stood concluded, the order of provisional attachment dated 20th January, 2021 would cease to have an effect. This opinion should not be misunderstood to mean that the power of provisional attachment can never be exercised by the authorities. There can be no quarrel on the said proposition as the statute is very clear and power can be exercised during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74.

The learned senior standing counsel would vehemently contend that pursuant to the action initiated under Section 67, sufficient material has been unearthed and proceedings are being initiated and ultimately show cause notice will be issued and if the appellants do not secure the amount indicated by the authorities in the communication dated 14th June, 2021, namely Rs.87.79 lakhs (approximately), the interest of revenue would suffer. In fact, such was the submission made by the Union of India in the case of *UFV India Global Education Vs. Union of India* reported in [2020] 122 taxmann.com 143 (Punjab & Haryana). The Hon'ble Punjab & Haryana High Court repelled the said contention and held that property of bank account of taxable person cannot remain attached under order passed under Section 83 if

proceedings initiated under Section 67 is over or culminated into proceedings under Sections 63 or Section 74 of CGST Act. In the instant case, the proceedings under Section 67 have been admittedly concluded and according to the department, they are entitled to issue show cause notice within a period of four years and therefore, the order of attachment should be allowed to continue till then, is an interpretation which cannot be accepted bearing in mind the legal principle as explained by the Hon'ble Supreme Court in ***Radha Krishan Industries (supra)***.

On this issue, it will be beneficial to refer to the decision in the case of ***Kushal Ltd. Vs. Union of India*** reported in ***[2020] 113 taxmann.com 622 (Gujarat)*** and the decision in the case of ***Valerious Industries Vs. Union of India*** reported in ***[2019] 109 taxmann.com 218 (Gujarat)***.

These decisions also will enure in favour of the appellants / assessee. Thus, for all the above reasons, we are of the view that the order of provisional attachment passed on 20th January, 2021 during the pendency of the proceedings under Section 67 of the CGST Act has worked out as admittedly the proceedings under Section 67 has already

been concluded and the department is said to be in the process of proceeding to take action under Section 74 of the CGST Act.

For the above reasons, the writ appeal and the connected application are allowed. Consequently, the writ petition is allowed and the order under appeal dated 20th January, 2021 and the communication dated 14th June, 2021 are quashed and the respondents are directed to intimate the appellants' banker within one week from the date of receipt of the server copy of this order to lift the attachment of the said bank account. We make it clear that we have tested the correctness of the order dated 20th January, 2021 qua the effect of it on conclusion of the proceedings under Section 67 of the CGST Act and simultaneously preserving the right of the department to exercise such powers if so advised under circumstances provided under Section 83 of the CGST Act.

The learned counsel for the appellants, on instructions, submitted that though one of the prayers sought for in the writ petition was to quash the notification of the Central Board of Excise and Customs dated 1st July, 2017 bearing notification no.14/2017 but for the present, the prayer is not pressed.

Urgent photostat certified copy of this order, if applied for, be given to the parties expeditiously upon compliance of all legal formalities.

(T. S. Sivagnanam, J.)

ns/pg

(Hiranmay Bhattacharyya, J.)