

**IN THE HIGH COURT FOR THE STATE OF TELANGANA,
HYDERABAD**

* * *

WRIT PETITION No.30818 of 2023

Between:
M/s. Adil Trading.

Petitioner

VERSUS

Superintendent of Customs and Ors.

Respondents

ORDER PRONOUNCED ON: 28.02.2024

THE HON'BLE SRI JUSTICE P.SAM KOSHY

AND

THE HON'BLE SRI JUSTICE N.TUKARAMJI

1. Whether Reporters of Local newspapers
may be allowed to see the Judgments? : Yes
2. Whether the copies of judgment may be
marked to Law Reporters/Journals? : Yes
3. Whether His Lordship wishes to
see the fair copy of the Judgment? : **Yes**

P. SAM KOSHY, J

N. TUKARAMJI, J

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! Counsel for Petitioner(s) : 1) Mr.Bhaskar Reddy vemi Reddy

^Counsel for the respondent(s) : 1) Mr. Dominic Fernandes

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? Cases referred

THE HON'BLE SRI JUSTICE P.SAM KOSHY
AND

THE HON'BLE SRI JUSTICE N.TUKARAMJI
W.P. No.30818 of 2023

ORDER: *(per Hon'ble Sri Justice P.SAM KOSHY)*

Heard Mr.Bhaskar Reddy Vemi Reddy, learned Senior Counsel appearing on behalf of Mr.V.Siddharth Reddy, learned counsel for the petitioner and Mr.Dominic Fernandes, learned Senior Standing Counsel for respondents.

2. Aggrieved by the order dated 18.05.2023, passed by the 3rd respondent, insofar, issuing the provisional attachment order under Section 83 of the CGST Act in Form GST DRC-22, the present writ petition has been filed. The contention of the petitioner is that the petitioner is a partnership firm carrying the business in the purchase and sale of iron scraps.

3. It is the contention of the petitioner that they have been regularly filing their returns and reporting the turnover to the respondent authorities in respect of the payments of all the tax liability after adjustments alleging inupt tax credit.

4. The 1st respondent issued summons to the petitioner seeking for production of records. The petitioner appeared before the 1st respondent along with relevant records including the tax

invoices of outward tax invoices and inward supply to bank statement and way bill etc., subsequently, the 2nd respondent issued Form GST DRC 01A, dated 28.04.2023, ascertaining the taxes to the tune of Rs.7,85,36,006/-, directing the petitioner to pay the said amount along with the interest and penalty. It was alleged that the petitioner has availed benefit of Input Tax Credit from invoices issued from non-existing firms, beyond this there has been no further proceedings drawn by the respondents either by issuance of show cause notice or by any proceedings drawn under Section 73 or for that matter under Section 74 of the CGST Act.

5. Assailing the said order of provisional attachment issued by the respondent, the petitioner contends that before the issuance of the provisional attachment order, the respondents have not served the petitioner with any notice in Form ASMT-10. In the process, the petitioner was not provided with any notice calling for his explanation for the discrepancy notice and for the payment of tax liability. Instead, the respondent officer has straightaway issued the impugned DRC-22. This order of provisional attachment is un-just, arbitrary and with malafied

intentions. The same has also not in conformity to the principles of natural justice and is liable to be set aside/quashed.

6. According to the learned counsel for the petitioner it was incumbent upon the Department to have first issued in Form GST ASMT 10, as is required his explanation. Should the respondents have resorted the proceedings drawn under Section 73 or under Section 74. Learned counsel for the petitioner relied upon the decisions of the Madras High Court in the case of ***M/s.Vadivel Pyrotech v. Assistant Commissioner***¹, there was yet another decision from Madras High Court in the case of ***Amutha Metal Industries v. Deputy State Tax Officer***², Madras High Court and in the case of ***Syska Led Lights Private Limited v. Union of India***³.

7. According to the learned counsel for the petitioner, the party is facing enormous inconvenience and difficulties as a consequence of the provisional attachment of the account. It was also the contention of the petitioner that even though the impugned order has passed as early as on 18.05.2023, yet till date the order of provisional attachment has not been served

¹2022(10) TMI 784 Madras High Court

²2022 (6) TMI 358 - Madras High Court

³2021 377 ELT 33 (Bom)

upon the petitioner. The impugned document on the basis of which the present writ petition has been filed is one which has been issued to the concerned bank of the petitioner with no intimation being made to the petitioner. On this ground along the impugned order deserves to be interdicted. According to the petitioner, the summons and notices which have been issued by the Department, he had promptly made his response and also made available with all relevant records and as such there was no necessity for the issuance of the provisional attachment order. Moreover, it is contended that before passing of the order of provisional attachment, the Department was liable to have a concrete evidence in respect of the so called evasion of tax by the petitioner. This in the other words means that under the normal parlance should not have initiated the action of provisional attachment which is mandatorily required under Section 83 itself and as such the said decision being too harsh. The same should be interfered with by this Court.

8. The learned Senior Counsel for the petitioner in the course of his submissions also contended that the impugned order on the part of the respondents is also bad in law for the reason that the order of provisional attachment under Section 83 has never

been issued as such he was not intimidated by any person inspite of the action of attachment, that he came to know before the attachment only from the bank authorities when the petitioner found it difficult to carry further transactions from the said account that they were informed about the provisional attachment by the respondent/Department. This according to the learned counsel for the petitioner was also in contravention to the provisions of Rule 159 of the CTST Rules 2017. He further submits that since the copy of the attachment was not served upon the petitioner, he cannot avail the remedy that is otherwise provided under Sub-Rule (5) of Rule 159.

9. The learned Senior Counsel for the petitioner also contended that the impugned order is also bad in law in as much as the same on being inconsonance to the provisions of section 83 of the CGST Act. As per the learned Senior Counsel, before issuance of the provisional attachment order, the mandatory requirement as envisaged under Section 83 is that the Commissioner shall form an opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary to pass an order under Section 83 ordering provisional attachment. The said forming of opinion is missing

from the impugned order. Therefore, the same is liable to be interdicted on this ground also.

10. Per contra, the learned Standing Counsel for the respondent/Department on the other hand opposing the petition submits that upon scrutiny of the return submitted by the petitioner, it has been reflected that the invoices on the basis of which the petitioner is said to have availed the benefit of ITC are all invoices which have been issued by fake and non-existing units and therefore, prima facie, it appears that the petitioner has wrongfully availed the ITC knowing fully well that it cannot had been availed. Referring to the invoices issued from M/s Hindustan Enterprises vs. K. enterprises Kolkata, the counsel for the Department contended that these are non-operating units so also the good which is reflected in the different invoices are only invoices which have been issued for the purpose of availing ITC and that infact, there has been no physical involvement of goods as mentioned in the invoices and that no materials were infact supplied and for this reasons also the provisional attachment order should not have been interfered with by this Court in exercise of its writ jurisdiction.

11. In addition, the learned counsel for the Department also submitted that upon verification, various other invoices the petitioner had relied upon for availing the ITC were found to be fake, without issuance of any supply of any goods. All of which establishes that the petitioner have fraudulently availed the ITC and therefore in order to ensure that these fraudulently availed ITC is not further utilize by the petitioner, the order of provisional attachment has been issued.

12. Having heard the contentions put forth on either side and on perusal of record it would be relevant at this juncture to take note of the two provisions under the statute. First is Section 83(1) of the CGST Act and other being Sub-Rule (5) of the Rule 159 of the CGST Rules. Both these provisions for convenience sake is being reproduced hereunder:

Section 83(1): Where, after the initiation of any proceeding under Chapter XII, Chapter XIV or Chapter XV, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue it is necessary so to do, he may, by order in writing, attach provisionally, any property, including bank account, belonging to the taxable person or any person specified in sub-section (1A) of section 122, in such manner as may be prescribed.

Rule 159(5): Any person whose property is attached may, [file an objection in FORM GST DRC-22A] to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in FORM GST DRC-23.

13. After reproducing the aforesaid provisions of law, it would be relevant at this juncture also necessary to take note of the operative part of the impugned order.

In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the CGST Act 2017, I Smt.V Sangeetha, Principal Commissioner, Hyderabad GST Commissionerate, hereby provisionally attach the aforesaid account.

14. Except for the words “in order to protect the interest of revenue” there does not appear to be any reflection of the grounds/reasons/circumstances that compelled the Principal Commissioner to pass the order of provisional attachment. If we look at section 83, what is envisaged is upon initiation of any proceedings under Chapter XII, Chapter XIV or Chapter XV, the Commissioner has to make up an opinion that opinion is to be formed on the basis of the reasons which formed in the course of proceedings from the circumstances that prevailed in between

etc., etc. If the opinions were not to be revealed and reflected in the order, the framers of law would have simply held that the Principal Commissioner had the power to issue orders of provisional attachment, protecting the interest of the government revenue. The very fact that the section provides for, moreover, to form an opinion before issuance of order of provisional attachment itself is sufficient enough to accept that it is required law that the order attachment in itself should disclose the reasons/circumstances and grounds which in the opinion of the Principle Commissioner required issuance of the order of provisional attachment. This view of the bench stands fortified from the decision of the Gujarat High Court in the case of ***M/s.Anjani Impex v. State of Gujarat***, wherein in paragraph Nos.15 to 17, it has been held as under:

15. A Coordinate Bench of this Court, to which one of us J.B. Pardiwala, J. was a party, had the occasion to discuss Section 83 of the Act in the case of Valerius Industries vs. Union of India, Special Civil Application No.13132 of 2019, decided on 28th August, 2019, wherein this Court drew the following conclusion:

"[1] The order of provisional attachment before the assessment order is made, may be justified if the assessing authority or any other authority

empowered in law is of the opinion that it is necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the belief.

[2] The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and far reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

[3] The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution.

[4] The power under Section 83 of the Act for provisional attachment should be exercised only if there is sufficient 11 W.P.No.12360 of 2022 material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his / her property with a view to thwarting the ultimate collection C/SCA/9822/2020 ORDER of

demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.

[5] The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

[6] The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings.

[7] The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (i) whether it is a revenue neutral situation (ii) the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax credit if the interest of the revenue is sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment."

16. We are of the view that none of the above referred conditions are fulfilled in the present case.

17. In the result, this writ application stands partly allowed. The relief with regard to the order in

Form GST DRC- 01A is not granted, whereas the order of provisional attachment of immovable property under Section 83 of the Act is quashed and set aside”.

15. Relying upon the said Division Bench decision of the Gujarat High Court, the Andhra Pradesh High Court also in the case of ***M/s.Arhaan Ferrous & Non ferrous Solutions & others v. Senior Intelligence Officer & others***, wherein the Andhra Pradesh High Court had referred to the decision of Gujarat High Court decision and made the following observations:

A perusal of the impugned orders of provisional attachment shows that the fourth respondent herein stated in the said orders that, as per the information available with the Department and in order to protect the interest of the Government revenue, in exercise of the powers conferred under Section 83 of the Act, the account is provisionally attached.

In this context, it may be appropriate to refer to the provisions of Rule 159 of the Sales Tax Rules. According to sub-Rule (5) of Rule 159 of the Rules, the assessee may, within seven days of the attachment under sub-Rule (1), file an objection to the effect that the property attached was or is not liable to attachment before the Commissioner and

the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in FORM GST DRC-23.

Admittedly, except saying that the orders of provisional attachment are passed in order to protect the interest of the Government revenue, no other reasons are assigned by the fourth respondent in the impugned orders of provisional attachment. When sub-Rule (5) of Rule 159 of the Rules specifically provides for filing objections against the orders of provisional attachment, the contention that the reasons for ordering provisional attachment were recorded in the Note File and that there is no need to extract the same or state the same in the provisional order of attachment, in the considered opinion of this Court, cannot stand for judicial scrutiny. The Hon'ble Supreme Court, in the above referred judgment, also categorically ruled that the formation of opinion on the basis of tangible material which indicates the necessity to order provisional attachment to protect the interest of the Government revenue is mandatory.

Unless reasons are recorded broadly, the assessee cannot be expected to file any objections under the provisions of sub-Rule (5) 13 of Rule 159 of the Rules.

16. In view of the aforesaid two decisions, i.e., the Division Bench of the Gujarat High Court and the Division Bench of

Andhra Pradesh High Court, under similar state of facts, if we look take into consideration the impugned order in the present case, relevant portion which has already been reproduced in the preceding paragraph, it leaves us in no doubt that the impugned order lacks reasons/grounds and circumstances on the basis of which the Principal Commissioner had formed an opinion that there was requirement for issuance of the order of provisional attachment.

17. We are fully endorsing the view of the two High Courts, wherein it has been emphatically held by both the High Courts that once when Rule 159(5) provides for filing an objection, the person who intends to file an objection must know the reasons and grounds under which the order was passed, so that he can effectively file his objection and made the objections and grounds on the basis of which, the order of provisional attachment was passed. We do not have any doubt for the aforesaid reasons that the impugned order is un-sustainable and the same deserves to be and is accordingly set aside. Nonetheless, the right of the respondents stands reserved if they so want to pass a fresh order under Section 83 after framing of an opinion which may not be spell out in the order enabling the

petitioner to avail the remedy available to him under Rule 159(5) of the CGST Rules.

18. With the aforesaid observation and direction this writ petition stands allowed.

Consequently, miscellaneous petitions pending, if any, shall stand closed.

P.SAM KOSHY, J

N.TUKARAMJI, J

Dated: 28.02.2024
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