

Allahabad High Court

Varun Gupta vs Union Of India And Another on 29 August, 2022

Bench: Surya Prakash Kesarwani, Jayant Banerji

HIGH COURT OF JUDICATURE AT ALLAHABAD

A.F.R.

(Judgment reserved on 11.08.2022)

(Judgment delivered on 29.08.2022)

In Chamber

Case :- WRIT TAX No. - 858 of 2022

Petitioner :- Varun Gupta

Respondent :- Union Of India And Another

Counsel for Petitioner :- Alok Saxena

Counsel for Respondent :- A.S.G.I., Sudarshan Singh

Hon'ble Surya Prakash Kesarwani, J.

Hon'ble Jayant Banerji, J.

(Per: Hon. Surya Prakash Kesarwani, J.)

1. Heard Sri Alok Saxena, learned counsel for the petitioner; Sri S.P. Singh, learned Additional Solicitor General of India assisted by Sri Sudarshan Singh, learned counsel for the respondent no.1

and Sri Dhananjay Awasthi, learned Senior Standing Counsel for the respondent no.2.

2. This writ petition has been filed praying for the following relief :

"1. Issue a writ of certiorari quashing order dated 19.05.2022 passed by the respondent no.02 i.e. the Commissioner of Central Goods and Service Tax Act, Ghaziabad directing provisional attachment of the bank accounts of the petitioner and of his firm, detailed in Para 5 of this Writ (Tax) Petition."

3. The petitioner is a proprietor of M/s. S G Plastic Industries, B-19 Roop Nagar Industrial Area, Loni, Ghaziabad, engaged in manufacturing of plastic granules and its compounding.

4. Earlier, Bank account of the petitioner was attached under Section 83 of The Central Goods & Services Tax Act, 2017 (hereinafter referred to as "the CGST Act, 2017") by order dated 22.10.2021, passed by the respondent no.2, against which the petitioner filed Writ Tax No. 448 of 2022 (Varun Gupta Versus Union of India and another) and the writ petition was allowed by order dated 11.05.2022 on the ground that no proceeding under Section 74 of CGST was pending as on the date of attachment. It was further observed that amended provisions of Section 83 of the CGST Act were not available when the attachment order was passed.

5. Consequently, the respondent no.2 has passed the order dated 18.05.2022 intimating the Bank that the attachment has been quashed but on the very next day, the respondent no.2 has passed the impugned order dated 19.05.2022, which is reproduced below:-

"To The Branch Manager AXIS Bank, D-46, RDC, Raj Nagar, Ghaziabad Provisional attachment of property under section 83 of CGST Act, 2017 It is to inform that M/s S.G. Industries (proprietor Sh. Varun Gupta) having principal place of business at B-19, Roop Nagar Industrial Area, Loni, Ghaziabad bearing registration number as 09ANFPG 1119E1ZH and PAN ANFPG1119E is a registered taxable person under the Act.

Proceedings have been launched against the aforesaid person under section 67 and Section 74 of the said Act to determine the tax or any other amount due from the said person. As per information available with the department, it has come to my notice that the said person has a bank account in your bank having account no.916010071529025.

In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, I Alok Jha, Commissioner, CGST, Ghaziabad, hereby provisionally attach the aforesaid account.

No debit shall be allowed to be made from the said account or any other account operated by the aforesaid person on the same PAN without the prior permission of this department.

(ALOK JHA) Commissioner "

6. As per impugned order proceedings under Sections 67 and 74 has been launched against the petitioner. However, learned counsels for the respondents have admitted before this Court on 14.07.2022 that "no proceedings under Sections 74 of the CGST Act, 2017 has yet been initiated". This fact has been recorded by this Court in paragraph 3 of the order dated 14.07.2022. After noticing the facts of the case in the aforesaid order date 14.07.2022, this Court referred to various paragraphs of the judgment of Hon'ble Supreme Court in the case of Radha Krishan Industries Vs. State of Himachal Pradesh and others (2021) 6 SCC 771 and observed in paragraph 4 as under :

"Despite being being repeatedly asked by us, learned ASGI and learned counsel for respondent no. 2 could not produce any opinion of the respondent no. 2 before this Court under Section 83 of the CGST Act, 2017 indicating that the Commissioner has recorded his opinion on some materials that it is necessary to attach the bank account of the petitioner to protect the interest of revenue."

7. In the case of Radha Krishan Industries (supra) Hon'ble Supreme Court has dealt with almost similar order under Section 83 of the C.G.S.T. Act and held as under :

"49 Now in this backdrop, it becomes necessary to emphasize that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is, in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute 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. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.

50 By utilizing the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorized not merely because it is expedient to do so (or profitable or practicable for

the revenue to do so) but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Necessity in other words postulates a more stringent requirement than a mere expediency. 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 crystallized. 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 cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assessee can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make preemptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue.

52 We adopt the test of the existence of "tangible material". In this context, reference may be made to the decision of this Court in the Commissioner of Income Tax v Kelvinator of India Limited³⁸. Mr Justice SH Kapadia (as the learned Chief Justice then was) while considering the expression "reason to believe" in Section 147 of the Income Tax Act 1961 that income chargeable to tax has escaped assessment inter alia by the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year, held that the power to reopen an assessment must be conditioned on the existence of "tangible material" and that "reasons must have a live link with the formation of the belief". This principle was followed subsequently in a two judge Bench decision in Income Tax Officer, Ward No. 162 (2) v Techspan India Private Limited³⁹. While advertent to these decisions we have noticed that Section 83 of the HPGST Act uses the expression "opinion" as distinguished from "reasons to believe". However for the reasons that we have indicated earlier we are clearly of the view that the 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.

70 EX facie, the above order passed by the Joint Commissioner does not indicate any basis for the formation of the opinion that the levy of a provisional attachment was necessary to protect the interest of the government revenue. The order in the file noting refers to the fact that the case of GM Powertech had been decided under Section 74 resulting in an additional demand of Rs. 39 crores on account of a fraudulent claim of ITC for FY 2017-18 and 2018-19. GM Powertech is alleged to have passed on the ITC to various Registered Tax Persons⁴⁰ situated in Himachal Pradesh by issuing invoices inter alia to the appellant during 2018-19 for which a case under Section 74 had been initiated. The order records that the appellant had claimed ITC of Rs 3.25 crores on the strength of the invoices issued by GM Powertech. The order merely records that the submissions which were urged by the appellant on 5 August 2020 "are not sustainable". "In view of the facts involved in the case", the Joint Commissioner concluded that it is necessary at this stage to safeguard the government revenue and since the appellant had sold goods to Fujikawa the payment due to it was being attached provisionally. The order of the Joint Commissioner contains absolutely no basis for

the formation of the opinion that a provisional attachment was necessary to safeguard the interest of the revenue. No tangible material has been disclosed. The record clearly reveals a breach of the mandatory pre-conditions for the valid exercise of powers under Section 83 of the HPGST Act.

77 For the above reasons, we allow the appeal and set aside the impugned judgment and order of the High Court dated 1 January 2021.

78 The writ petition filed by the appellant under Article 226 of the Constitution shall stand allowed by setting aside the orders of provisional attachment dated 28 October 2020."

8. Amended Section 83 of the CGST Act reads as follows :

"83. Provisional attachment to protect revenue in certain cases.

(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.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under sub-section (1)."

9. In Section 83 of the CGST Act, following expressions have been used :

(i) Commissioner is of the opinion

(ii) that for the purpose of protecting the interest of the Government revenue

(iii) it is necessary so to do

(iv) by order in writing, attach provisionally

(v) in such manner as may be prescribed.

10. Chapter XII of the CGST Act contains Sections 59 to 64 providing for assessment. Chapter XIV contains Sections 67 to 72 providing for inspection, search, seizure and arrest. Chapter XV contains Sections 73 to 84 providing for demands and recovery.

11. Plane reading of Section 83 of the CGST Act leaves no manner of doubt that firstly, there is necessity of the formation of opinion by the Commissioner; secondly, the opinion must be formed before ordering a provisional attachment; thirdly, the opinion must indicate that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourthly, the order must be in writing for the attachment of any property of the taxable person; and fifthly, observance of the

Rules by the Commissioner in regard to the manner of attachment. Each of these components of Section 83 are integral to a valid exercise of power. The statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue. The expression "it is necessary so to do" clearly evidences an intent of the legislature that an attachment is authorized not merely because it is expedient to do so but because it is necessary to do so in order to protect interest of the government revenue. The word "necessary" postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Thus, a more stringent requirement than a mere expediency, has been provided in Section 83. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue. This necessarily requires existence of tangible material before the Commissioner so as to enable him to form his opinion for provisional attachment of the property of an assessee/person including bank account, which may indicate a live link to the necessity to order a provisional attachment to protect the interest of the Government Revenue. Each of the aforementioned ingredients of Section 83 must be strictly applied and complied before a provisional attachment on the property of an assessee can be made. In the impugned provisional attachment order there is absence of the aforesaid ingredients of Section 83. Therefore, the impugned order having been passed by the respondent No.2 by arbitrarily exercising his power, can not be sustained. Therefore, it deserves to be quashed.

12. In paragraph 11 of the aforesaid judgment in the case of Radha Krishan Industries (supra), Hon'ble Supreme Court reproduced the order under Section 83 of the Act dated 28.10.2020, as under :

"In order to protect the interests of revenue and in exercise of the powers conferred/delegated by Commissioner of the State Taxes & Excise, HP vide office order No.12-4/78-EXN-Tax-Part-278/22(a)- 26780-82 dated 21.10.2020 under section 83 of the Act, I, U.S. Rana, Joint Commissioner of State Taxes & Excise, South Enforcement Zone, Parwanoo, hereby provisionally attach the payment to the extent of Rs.5,03,82,554/- of M/s Radha Krishan Industries, Kala-Amb. Henceforth, no payment shall be allowed to be made from your company to M/s RadhaKrishan Industries without the prior permission of this department / office."

13. The order impugned in the present writ petition is almost similar to the order which was impugned before the Hon'ble Supreme Court in the case of Radha Krishan Industries (supra) which has been quashed by Hon'ble Supreme Court with observations aforequoted.

14. Facts of the present case clearly reveals that no proceedings under Section 74 of the C.G.S.T. Act has yet been initiated. That apart the respondent No.2 while passing the impugned order, has neither recorded his opinion nor referred to any tangible material which necessitated him to pass the impugned provisional attachment order so as to protect the interest of the Government revenue. The basic ingredients required for passing the impugned order under Section 83 of the CGST Act as also authoritatively pronounced by Hon'ble Supreme Court and binding upon the respondents

under Article 141 of the Constitution of India, have been deliberately and completely ignored by the respondent No.2. Despite the earlier order having been quashed by this Court, the respondent no.2 has chosen to pass the impugned order on the very next day of withdrawing the earlier order. The impugned order has been passed in a most arbitrary and illegal manner and in complete disregard of provisions of Section 83 of the C.G.S.T. Act read with Rule 159 of the C.G.S.T. Rules 2017 and the law laid down by Hon'ble Supreme Court in the case of Radha Krishan Industries (supra). Consequently, the impugned order can not be sustained and deserves to be quashed with exemplary cost.

Imposition of Cost:-

15. In the case of Punjab State Power Corporation Ltd. vs. Atma Singh Grewal, (2014) 13 SCC 666 (para 14), Hon'ble Supreme Court stressed that cost should be in real and compensatory terms and not merely symbolic. It further expressed the need to recover the cost from erring officers. Paragraph-14 of the Punjab State Power Corporation Ltd. (supra) is reproduced below:

"14. No doubt, when a case is decided in favour of a party, the Court can award cost as well in his favour. It is stressed by this Court that such cost should be in real and compensatory terms and not merely symbolic. There can be exemplary costs as well when the appeal is completely devoid of any merit. [See Rameshwari Devi v. Nirmala Devi (2011) 8 SCC 249]. However, the moot question is as to whether imposition of costs alone will prove deterrent? We do not think so. We are of the firm opinion that imposition of cost on the State/PSU's alone is not going to make much difference as the officers taking such irresponsible decisions to file appeals are not personally affected because of the reason that cost, if imposed, comes from the government's coffers. Time has, therefore, come to take next step viz. recovery of cost from such officers who take such frivolous decisions of filing appeals, even after knowing well that these are totally vexatious and uncalled for appeals. We clarify that such an order of recovery of cost from the officer concerned be passed only in those cases where appeal is found to be ex-facie frivolous and the decision to file the appeal is also found to be palpably irrational and uncalled for."

(Emphasis supplied by us)

16. For all the reasons aforesaid, the impugned order dated 19.05.2022 under Section 83 of the C.G.S.T. Act 2017 passed by the respondent no.2, can not be sustained and is hereby quashed. Writ petition is allowed with cost of Rs. 50,000/- which shall be paid by the respondents to the petitioner within two weeks.

Order Date :- 29.8.2022/vkg