
IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
WRIT PETITION NO.6278 OF 2024

Patil Construction & Infrastructure Ltd. ...Petitioner

Versus

The Commissioner of State Tax & Ors. ...Respondents

WITH
WRIT PETITION NO.6279 OF 2024

PCIL & MBPCL Joint Venture ...Petitioner

Versus

The Commissioner of State Tax & Ors. ...Respondents

WITH
WRIT PETITION NO.6280 OF 2024

PCIL HAM Talegaon Dhamdhare Pvt. Ltd. ...Petitioner

Versus

The Commissioner of State Tax & Ors. ...Respondents

Mr. Deepak Bapat, Sonali Bapat & Pragati Khaire,
Advocates for Petitioner in all Petitions.

Ms. S.D. Vyas, Addl.G.P. a/w. Ms. P.N. Diwan, AGP for
Respondent-State.

Mr. Satyaprakash Sharma with Megha Pandey i/b.
Karan Aadik, Advocates for Respondent No.2.

CORAM : B. P. COLABAWALLA &
SOMASEKHAR SUNDARESAN, JJ.

DATE : MAY 02, 2024

P. C.

1. The above Writ Petitions are filed seeking quashing of impugned orders in FORM GST DRC-22 dated 5th April 2024 (Exhibit-A to the Petition). These attachment orders at Exhibit A have been issued pursuant to an attachment order passed by the GST Authorities under Section 83 of the Maharashtra Goods and Services Tax Act, 2017 (“**MGST Act**”), read with Central Goods and Services Tax Act, 2017 (“**CGST Act**”) read with Rule 159 of the Central Goods and Services Tax (CGST) Rules, 2017 (“**CGST Rules**”). The order passed under Section 83 (which is at Exhibit B) sets out the liability that is provisionally determined on investigation that is carried out and also records the tax paid. Thereafter in Paragraph 4, it is stated that since the Petitioner has failed to discharge the liability without any justification, the Joint Commissioner of State Tax-II, Pune Division, Pune is of the opinion that there is every chance that the Petitioner shall default in paying the ultimate tax, interest and penalty, for which a demand may be raised in assessment proceedings on completion. Therefore, the said authority is of the opinion that it is necessary to exercise powers under section 83 of the MGST Act read with Rule 159 of the CGST

Rules, for the purpose of protecting the interest of the government revenue. Accordingly, all bank accounts of the Petitioner are attached, and the Petitioner and the banks are directed not to carry out any transaction, whatsoever, from the date of the said order dated 5th April 2014 till the receipt of written orders from the GST Authorities regarding release of the bank accounts.

2. On perusing the said order which also doubles up as a Show Cause Notice as to why the said order should not continue, we find that it is bereft of any material to show that for protecting the interest of the government revenue, it is necessary to attach the bank accounts of the Petitioner. We say this because Section 83 of the MGST Act stipulates that 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 an 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. For the sake of convenience, Section 83 is 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 an 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).

(emphasis supplied)

3. As can be seen from the aforesaid section, before powers under section 83 can be exercised, the Commissioner has to be satisfied that for the purpose of protecting the interest of the government revenue and “*it is necessary so to do*”, he may attach provisionally any property of the taxable person or any person specified in Section 122(1A). This is a *sine qua non* for exercising powers under Section 83. This issue is no longer *res integra* and has been succinctly set out by the Hon’ble Supreme Court in the case of ***M/s Radha Krishan Industries Vs. State of Himachal Pradesh & Ors.***¹, the relevant portion of which reads thus:-

“49. Now in this backdrop, it becomes necessary to emphasise that before the Commissioner can levy a

¹ (2021) 6 SCC 771

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 finalisation 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 preconditions 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 utilising the expression “it is necessary so to do” the legislature has evinced an intent that an attachment is authorised 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 crystallised. **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 authorise Commissioners to make pre-emptive 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.**

51. These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine

of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. **Moreover, the words embodied in sub-section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement.** While dealing with a similar provision contained in Section 45 [Section 45 (1) provides as follows:“**45. Provisional attachment.**—(1) Where during the tendency of any proceedings of assessment or reassessment of turnover escaping assessment, 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 belonging to the dealer in such manner as may be prescribed.”] of the Gujarat Value Added Tax Act, 2003, one of us (Hon'ble M.R. Shah, J.) speaking for a Division Bench of the Gujarat High Court in *Vishwanath Realtor v. State of Gujarat* [*Vishwanath Realtor v. State of Gujarat*, 2015 SCC OnLine Guj 6564] observed : (*Vishwanath Realtor case* [*Vishwanath Realtor v. State of Gujarat*, 2015 SCC OnLine Guj 6564] , SCC OnLine Guj para 26)

“26. Section 45 of the VAT Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the

interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer. **However, such satisfaction must be on some tangible material on objective facts with the Commissioner.** *In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any order is passed against the dealer under the VAT Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under Section 45 of the VAT Act."*

(emphasis supplied)

E. Summary of findings

76. For the above reasons, we hold and conclude that:

76.1. The Joint Commissioner while ordering a provisional attachment under Section 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5(3) and an appeal against the order of provisional attachment was not available under Section 107(1).

76.2. The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable.

76.3. The High Court has erred in dismissing the writ petition on the ground that it was not maintainable.

76.4. The power to order a provisional attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled.

76.5. The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. **Before ordering a provisional attachment the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the government revenue.**

76.6. The expression "necessary so to do for protecting the government revenue" implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment.

76.7. The formation of an opinion by the Commissioner under Section 83(1) **must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the government revenue.**

76.8. In the facts of the present case, there was a clear non-application of mind by the Joint Commissioner to the

provisions of Section 83, rendering the provisional attachment illegal.

76.9. Under the provisions of Rule 159(5), the person whose property is attached is entitled to dual procedural safeguards:

- (a) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and
- (b) An opportunity of being heard.

There has been a breach of the mandatory requirement of Rule 159(5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard.

76.10. The Commissioner is duty-bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached.

76.11. A final order having been passed under Section 74(9), the proceedings under Section 74 are no longer pending as a result of which the provisional attachment must come to an end.

76.12. The appellant having filed an appeal against the order under Section 74(9), the provisions of sub-sections (6) and (7) of Section 107 will come into operation in regard to the payment of the tax and stay on the recovery of the balance as stipulated in those provisions, pending the disposal of the appeal.”

(emphasis supplied)

4. As can be seen from the above reproduction, the Hon’ble

Supreme Court has opined that the power to order a provisional attachment [under Section 83] of the property of the taxable person, including a bank account, is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly followed. The Hon'ble Supreme Court has further opined that the exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that "*it is necessary so to do*" for the purpose of protecting the interest of the Government revenue. The Hon'ble Supreme Court has opined that before ordering a provisional attachment, the Commissioner must form an opinion on the basis of *tangible material* that the assessee is likely to defeat the demand, if any, and therefore, "*it is necessary so to do*" for the purpose of protecting the interest of the Government revenue.

5. The expression "*necessary so to do for protecting the government revenue*" implicates that the interests of the government revenue cannot be protected without ordering a provisional attachment. Once this is the law laid down by the Hon'ble Supreme Court, and which we find applies with full force to the facts of the present case, we have no hesitation in quashing the impugned attachments in FORM GST DRC-22 dated 5th April 2024 (Exhibit-A)

and the order passed under Section 83 also dated 5th April 2024 (Exhibit B).

6. Accordingly, the above Writ Petitions succeed in the aforesaid terms and are accordingly disposed of. However, there shall be no order as to costs.

7. We, however, clarify that this order will not preclude the GST Authorities from issuing a fresh provisional attachment order by satisfying the requirements as set out by the Hon'ble Supreme Court in *Radha Krishan Industries (supra)*.

8. This order will be digitally signed by the Private Secretary/Personal Assistant of this Court. All concerned will act on production by fax or email of a digitally signed copy of this order.

[SOMASEKHAR SUNDARESAN, J.]

[B.P. COLABAWALLA, J.]