JUDGEMENT ON PROVISIONAL ATTACHMENT U/S 83 OF CGST/SGST

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

Judgement delivered by Honourable Justice Dr Dhananjaya Y Chandrachud, J

[i]Civil Appeal No 1155 of 2021 | Order date 20.04.2021

[Arising out of SLP(C) No 1688 of 2021)-writ petition instituted under Article 226 of the Constitution challenging orders of provisional attachment u/s 83 of GST Laws wherein judgment and order was passed on 01 January 2021 by a Division Bench of the High Court of Himachal Pradesh]

M/s Radha Krishan Industries- Appellant (In short "Party") Versus
State of Himachal Pradesh & Others- Respondents (In short "Govt.")

FACTS OF THE CASE

- Party is registered under Himachal Pradesh GST Act.
- On 3 October 2018, a show cause notice was issued to party under Section 74 of the HPGST Act and the Central Goods and Services Tax Act by the Govt. requiring it to appear on 9 October 2018 and produce certain documents. Party complied the said notice.
- On 10 October 2018, a 'detection case' was registered against one supplier of the party, under Section 74 of the HPGST Act and the CGST Act read with Section 20 of the Integrated Goods and Services Tax Act, 20178. This was through a search and seizure under Section 67 of the HPGST Act and CGST Act. Said supplier was arrested on 3 December 2018 on the ground of raising fraudulent claims of input tax credit from fake/fictitious firms in Delhi and Kanpur.
- The party received a memo by an e-mail dated 15 December 2018 from the Govt. directing it to be present on 17 December 2018 for explaining the allegedly illegal claim of ITC made during 2017-18 and 2018-19. By its letter dated 17 December 2018, the party contended that it had validly claimed ITC as it fulfilled the conditions under Section 16 and other provisions of the HPGST Act and the CGST Act.
- On 9 January 2019, a notice (SCN) was issued to a customer (Debtor) of the party, for provisionally attaching an amount of Rs. 5 crores due to the party, under Section 83 of the HPGST Act. On 19 January 2019, the Govt. passed an order of provisional attachment in respect of receivables worth Rs. 5 crores due from debtor. The party responded by a representation dated 29 January 2019, claiming inter alia, that the order of attachment was without affording a hearing.

The party also claimed that on 26 December 2018, they had noticed that the ITC had been blocked without prior notice. On 30 January 2019, the notice of attachment was withdrawn by the Govt.

- According to the Govt., after the case of supplier was investigated, tax evasion was detected as supplier was found to have claimed and utilized ITC against invoices issued by "fake fictitious firms without actual movement of good". **Supplier had issued invoices to various recipients in Himachal Pradesh including the party**. On 4 July 2020, the Govt. issued an intimation to the appellant under Section 74(5) of the HPGST Act of tax ascertained in Form GST DRC-01A as being payable, advising it to pay tax, interest, and penalty of Rs. 5.03 crores. The party was given an opportunity to file its submissions against the ascertainment of the amount by 4 August 2020.
- A tax liability of Rs 39.48 crores was confirmed against supplier on the conclusion of the proceedings against it. Supplier was found to have no business establishment or property in Himachal Pradesh and the case was considered to fall into the category of a serious tax fraud.
- On 21 October 2020, the Commissioner of State Taxes and Excise, Himachal Pradesh delegated his powers under Section 83 of the HPGST Act to the Govt. In exercise of the powers delegated by the Commissioner, Govt. issued two orders of provisional attachment dated 28 October 2020 attaching the receivables of the party from its customers. The attachment order issued to one debtor under Rule 159(1) of the HPGST Rules noted that it owed about Rs. 4 crores to the party. The order states that the party was found to be involved in an ITC fraud amounting to Rs.5,03,82,554/- (Rs. 5.03 crores) during 2017-18 and 2018-19. A similar order was issued to one more debtor, noting that a payment of Rs. 2.91 crores were owed by it to the party.
- On 4 November 2020, the party filed a representation and objections against the attachment and denied liability. By an order dated 6 November 2020, the Govt. rejected the objections of the supplier. The Govt. stated that collectively payments "only" worth Rs. 4.92 crores from both party's customers were attached.
- On 27 November 2020, the Govt. issued a notice to show cause to the party under Section 74(1) of the HPGST Act for recovering the ITC, interest, and penalty. The notice was issued on the basis that the party had claimed ITC on the supplies received from supplier and since the inward supplies made by supplier were found to be fake, the party's claim of ITC was also in question.

PROCEEDINGS IN HIMACHAL PARDESH HIGH COURT
(In [ii]Writ Petition No. 5648 of 2020 filed by party under Article 226 of the Constitution of India)

- The orders of provisional attachment and the order passed by the Commissioner on 21 October 2020 delegating his powers under Section 83 of the HPGST Act to the Govt., were challenged by the party before the HP High Court.

- HP High Court dismissed the petition on below grounds: -

    - It was undisputed that the Party and the Divisional Commissioner, who has been appointed as Commissioner (Appeals) under the GST Act, are constituted under the HPGST Act, and therefore, it is assumed that there is no illegal or irregular exercise of jurisdiction.
    - Even if there is some defect in the procedure followed during the hearing of the case, it does not follow that the authority acted without jurisdiction, and though the order may be irregular or defective, it cannot be a nullity so long it has been passed by the competent authority.
    - Writ is ordinarily not maintainable when there exists an alternative remedy. The exceptions to this rule are where the statutory authority has not acted in accordance with the provisions of the legislation; or acted in defiance of the fundamental principles of judicial procedure or where an order has been passed in violation of the principles of natural justice. It would not entertain a petition under Article 226 of the Constitution, if an efficacious remedy is available to the aggrieved person or where the statute under which the action complained of has been taken contains a mechanism for redressal of grievances. When a statutory forum of appeal exists, an appeal should "not be entertained ignoring the statutory dispensation".
    - Noting that the party has an alternative and efficacious remedy of appeal under Section 107 of the HPGST Act, refused to entertain the writ petition.

- The dismissal of the petition challenging the orders of provisional attachment is in question in the present proceedings before Supreme Court.

SUMMARY OF FINDINGS AND JUDGEMENT

- 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).
- The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable.
- The High Court has erred in dismissing the writ petition on the ground that it was not maintainable.
- **The power to order a provisional attachment of the property of the taxable person including a bank account is <u>draconian in nature</u> and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled**.
- 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 based on 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.

- 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.
- 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.
- 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.
- 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 to grant an opportunity of being heard.
- 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.
- A final order having been passed under Section 74(9), the proceedings under Section 74 are no longer pending because of which the provisional attachment must come to an end.
- The party 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.

HELD

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

- 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.

- There shall be no order as to costs. Pending application(s), if any, stand disposed of.

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[ii] *Download copy of judgement here- click here*