
(2021) 08 BOM CK 0030

In the Bombay High Court

Case No : Interim Application No. 1322 Of 2021 In Writ Petition No. 2127 Of 2021

Fine Exime Private Limited

APPELLANT

Vs

Union Of India And Others

RESPONDENT

Date of Decision : 10-08-2021

Acts Referred:

Central Goods And Services Tax Act, 2017 — Section 54, 62, 63, 64, 67, 73, 74, 83, 107, 107(6), 107(7)
Himachal Pradesh Goods And Services Act, 2017 — Section 83(1), 107

Citation : (2021) 08 BOM CK 0030

Hon'ble Judges : Dipankar Datta, CJ;G. S. Kulkarni, J

Bench : Division Bench

Advocate : Prakash Shah, Jas Sanghvi, Pradeep Jetly, Sujit Mashal, Huzeta Nasikwala

Final Decision : Disposed Of

Judgement

Dipankar Datta, CJ

1. Interim Application No. 1322 OF 2021 dated June 6, 2020 is filed in Writ Petition No. 2127 of 2021. The prayers in the interim application read as follows:

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(a) That this Hon'ble Court be pleased to modify its order dated 02.03.2021 and the direction given in paragraph 6 of the said order dated 02.03.2021 that "the remaining amount of 90% continuing under debit freeze which shall be subject to outcome of the appeal or such order that may be passed by the appellate authority" be deleted.

(b) That this Hon'ble Court be pleased to quash and set aside the impugned attachment order dated 01.12.2020 issued by Respondent No.2 and de-freeze the balance amount of 90% kept in debit freeze vide order dated 02.03.2021 passed by this Hon'ble Court.

(c) That this Hon'ble Court be pleased rectify the word 'Respondent No.2' with the word 'Respondent No.3' in paragraph 1 of the said order dated 02.03.2021 passed by this Hon'ble Court.

(d) That this Hon'ble Court be pleased direct Respondent No.4 to decide the Appeal bearing V2(A)123/ADC/JC/CGST/ME/2021 filed by the Petitioner expeditiously preferable within a period of 4 weeks.

2. While hearing the interim application, we have heard Mr.Shah, learned counsel for the applicant/writ petitioner (hereafter 'the petitioner') and Mr.Jetly, learned senior counsel for the respondents on the merits of the writ petition too. We propose to dispose of the writ petition as well as the interim application by this common judgment and order.

3. The petitioner invoked the writ jurisdiction of this Court for quashing of an order dated December 1, 2020 passed by the Principal Commissioner, Central Tax and CX, Mumbai East, Mumbai (respondent no.2). By such order, the respondent no.2 had directed provisional attachment of the petitioner's bank account maintained with the Development Bank of Singapore Ltd. (respondent no.3), in exercise of power conferred by Section 83 of the Central Goods and Services Tax Act, 2017 (hereinafter "the CGST Act" for short). The respondent no.3 was directed not to allow any debit to be made from the said account or any other account operated by the petitioner without prior permission.

4. A bare reading of the order dated December 1, 2020 would reveal that the petitioner was accused of claiming fraudulent refund under Section 54 of the CGST Act. It is also noted therefrom that the respondent no.2 was given to understand by the Dongri Police Station, Mumbai (vide correspondence dated November 27, 2020) that upon a written request being made, the said bank account having Rs.5,20,13,134/- had been temporarily frozen by the respondent no.3.

5. The petitioner mounted a challenge to the said order dated December 1, 2020 on the ground that the condition precedent for provisional attachment of a bank account, as referred to in Section 83 of the CGST Act, was non-existent. Since no proceedings against the petitioner were pending under Sections 62 or 63 or 64 or 67 or 73 or 74 of the CGST Act, it was claimed that the respondent no.2 had acted without jurisdiction.

6. The writ petition was considered by a co-ordinate Bench on March 2, 2021. The Bench noted that on January 13, 2021, a show-cause notice was issued to the petitioner whereafter an order in original dated February 12, 2021 had been passed by the Deputy Commissioner of CGST and Central Excise, Mumbai Central Commissionerate confirming the demand of Rs.5,20,13,134/- along with interest and penalty. After so noting, the Bench proceeded to pass the following order: -

".....

2.

3. Learned counsel for the petitioner submits that the very purpose of provisional attachment of the bank account is no longer available with the respondents as the matter has attained finality in the form of order in original subject to filing of appeal by the petitioner. He therefore, seeks withdrawal of the provisional attachment order.

4. On the other hand, Mr. Jetly submits that the entire refund was obtained by the petitioner fraudulently. When officials of respondent No.2 visited the premises of the petitioner no such premises were found, not to speak of any personnel of the petitioner. In such circumstances, he submits that as on today the provisional attachment should not be withdrawn.

5. We have heard learned counsel for the parties and given our thoughtful consideration to the entire matter.

6. Without expressing any opinion on merit, at this stage, we find that the order in original is appealable before Commissioner (Appeals) subject to payment of 10% of the demand. Since petitioner has a statutory right of filing appeal against the order in original, to make such right meaningful, we direct that provisional attachment of the aforesaid bank account of the petitioner shall be withdrawn to the extent of 10% of the credited amount as on today with the remaining amount of 90% continuing under debit freeze, which shall be subject to outcome of the appeal or such order that may be passed by the appellate authority.

7. Stand over to 20th April, 2021.”

7. Availing the leave granted by the order dated March 2, 2021, the petitioner carried the order dated February 12, 2021 in an appeal under Section 107 of the CGST Act. As required by sub-section (6) of Section 107, requisite amount has been pre-deposited for consideration of the appeal. Referring to the same, it is contended in the interim application that in terms of sub-section (7) of Section 107 of the CGST Act, the respondents are statutorily restrained from initiating proceedings for recovery of any balance sum. The interim application also refers to the decision of the Supreme Court in *Radha Krishan Industries vs. State of Himachal Pradesh & Ors.*, reported in 2021 SCC OnLine SC 334. According to the petitioner, proceedings which were initiated stand terminated by reason of the final order dated February 12, 2021 and, therefore, there could be no cause for the respondents to keep the order of provisional attachment of its bank account alive.

8. Having regard to the nature of relief claimed in the writ petition as well as the interim application, set out above, we are tasked to decide a simple issue: whether, having regard to the decision in *Radha Krishan Industries (supra)*, the order of provisional attachment dated December 1, 2020 can be kept alive?

9. Mr. Jetly contended that the decision in *Radha Krishan Industries (supra)* was rendered considering a very different fact situation and, therefore, the ratio of such decision is not applicable here; and notwithstanding the decision in *Radha*

Krishan Industries (supra) and culmination of the proceedings initiated against the petitioner by the order dated February 12, 2021, since carried in appeal which is pending, the respondents are justified in not lifting the order of provisional attachment because new facts of the revenue being defrauded by the petitioner have been unearthed. Mr. Jetly, by referring to the reply affidavit of the respondent no.2 to the additional affidavit of the petitioner, more particularly paragraphs 5 to 8, contended that investigations against the petitioner are in progress and that further proceedings in terms of Section 74 of the CGST Act are in contemplation; in view thereof, it would hit the interest of the revenue hard if relief claimed by the petitioner is granted.

10. In Radha Krishan Industries (supra), an order of provisional attachment was challenged before the relevant Himachal Pradesh High Court in a writ petition. Such petition was dismissed on the ground that an alternative remedy was available. Dismissal of the writ petition was challenged before the Supreme Court. The Supreme Court held that the writ petition was maintainable before the High Court, which had erred in dismissing it. While proceeding to answer the issue as to whether the order of provisional attachment under challenge was issued in valid exercise of power conferred by the Himachal Pradesh Goods and Services Act, 2017 (hereafter "the HPGST Act"), the Court had the occasion to analyze the legal position in respect of, inter alia, provisional attachment. It was held that the power to order provisional attachment of property under Section 83(1) of the HPGST Act was a drastic power being draconian in nature, the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled. Considering the provisions of Section 107 of the HPGST Act, including its sub-sections (6) and (7), and bearing in mind that the order of provisional attachment had been made during pendency of proceedings under Section 74 thereof which, in due course of time, stood concluded by an order had been made under sub-section (9) thereof, the Court proceeded to observe in paragraph 77 as follows: -

"77. Clause (a) of sub-Section (6) provides that no appeal shall be filed without the payment in full, of such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order as is admitted. In addition, under clause (b), ten per cent of the remaining amount of tax in dispute arising from the order has to be paid in relation to which the appeal has been filed. Upon the payment of the amount under sub-Section (6) the recovery proceedings for the balance are deemed to be stayed. Thus, in any event, the order of provisional attachment must cease to subsist. The appellant, having filed an appeal under Section 107, is required to comply with the provisions of sub-Section (6) of Section 107 while the recovery of the balance is deemed to be stayed under the provisions of sub-Section (7). As observed hereinabove and under Section 83, the order of provisional attachment may be passed during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74. Therefore, once the final order of assessment is passed under Section 74 the order of provisional attachment must cease to subsist. Therefore,

after the final order under Section 74 of the HPGST Act was passed on 18 February, 2021, the order of provisional attachment must come to an end.”

(emphasis supplied)

11. It has not been shown by Mr. Jetly that the provisions of the HPGST Act and the rules framed thereunder, which were under consideration in Radha Krishan Industries (supra), are in any manner different from the CGST Act and the rules framed thereunder with which we are concerned. It also matters little that proceedings initiated against the appellant in Radha Krishan Industries (supra) were different from the provision under which proceedings have been initiated against the petitioner. Suffice it to note, proceedings having been initiated against the petitioner under Section 73 of the CGST Act and such proceedings having been terminated by a final order under sub-section (9) thereof, for all intents and purposes the proceedings do not survive and, a fortiori, such termination would have the effect of terminating the life of the order of provisional attachment.

12. We also record that the order of provisional attachment, which is the subject matter of challenge in the writ petition, suffers from an error of jurisdictional fact. Proceedings under Section 73 had been initiated against the petitioner for reclaiming the erroneous refund, which was earlier effected on its prayer. The order of provisional attachment was made not during pendency of any proceedings under Sections 62 or 63 or 64 or 67 or 73 or 74 of the CGST Act but was made in view of contemplation of proceedings under Section 73 thereof. From its inception, i.e., December 1, 2020, the order of provisional attachment was not at all a valid order. The show-cause notice having been issued on January 13, 2021 under Section 73(1) of the CGST Act, i.e., almost 45 days after the order of provisional attachment was made, the latter suffered from an error of jurisdictional fact in that, as on December 1, 2020, no proceedings of the nature referred to in sub-section (1) of Section 83 had been initiated; and, therefore, question of pendency of such proceedings did not and could not arise. The jurisdictional fact for exercise of power under Section 83 being non-existent, we declare the order dated December 1, 2020 as void ab initio.

13. Be that as it may, the proceedings under Section 73 of the CGST Act having been taken to its logical conclusion, the purpose for which the order of provisional attachment had been made has also ceased to survive and, therefore, the petitioner is justified in its claim that such order of provisional attachment ought to be set aside.

14. We grant order in terms of prayer clause (b) of the interim application. Since the order dated March 2, 2021 would merge in this final judgment and order, we find no reason to modify the order dated March 2, 2021 in the manner as prayed for vide prayer clause (a). There shall also be an order in terms of prayer clause (c) of the interim application. The necessary correction may be incorporated in paragraph 2 of the order dated March 2, 2021 by correcting the figure “2” in the

4th line of paragraph 2 to read "3". Insofar as prayer clause (d) is concerned, we make no order since no party is described as respondent no.4 in the array of respondents in the writ petition. Without any party being brought on record of the writ petition in a manner known to law, arraying the appellate authority as respondent no.4 in the interim application by the petitioner was not proper.

15. The writ petition as well as the interim application stands disposed of. There shall be no order as to costs.

16. Needless to observe, if in future proceedings are initiated against the petitioner under Section 74 of the CGST Act or under any other provision as is mentioned in Section 83 thereof, and circumstances do exist for ordering provisional attachment of the petitioner's property, the respondents shall be free to proceed and attach such property in accordance with law.