

(2015) 04 KAR CK 0372

In the Karnataka High Court

Case No : Writ Petition No. 14054 of 2015 (T-TAR)

Prashanthi

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 29-04-2015

Acts Referred:

Finance Act, 1994 — Section 69, 70, 71, 72, 73

Citation : (2016) 41 STR 392

Hon'ble Judges : Aravind Kumar, J

Bench : Single Bench

Advocate : Naveen Kumar K.S. and R. Dakshina Murthy, for the Appellant; N.R. Bhaskar, Advocates for the Respondent

Judgement

Aravind Kumar, J—Petitioner is seeking for the following reliefs;

"(a) Issue a writ of certiorari or such other Writ, Order or direction as this Hon"ble Court may deem fit, quashing the following four recovery notices:

(a). Recovery Notice in C. No. IV/06219/2013-14 SIV-I Dt. 12.3.2015 in Annexure L, issued to M/s. Alvares & Thomas, Mangalore.

(b) Recovery Letter in C. No. IV/06219/2013-14 SIV-I Dt. 12.3.2015 in Annexure N, issued to M/s. Cargo Links, Mangalore.

(c) Recovery Notice in C. No. IV/06219/2013-14 SIV-I Dt. 12.3.2015 in Annexure P, issued to M/s. Axis Bank.

(d) Recovery Notice in C. No. IV/06219/2013-14 SIV-I Dt. 16.3.2015 in Annexure R, issued to M/s. Union Bank of India, as being illegal and untenable in law, in the facts and circumstances of the instant case;

(b) Issue a writ of Certiorari, or such other Writ, Order or direction in the nature of a writ of certiorari/mandamus, quashing the investigation proceedings mentioned in the above Annexure L, N, P and R against the petitioner's husband Late Sri. P.S. Harsha under the provisions of the Finance Act, 1994;

(c) Issue a writ of mandamus, or such other writ, order or direction, as this Hon'ble Court may deem fit and proper, to Respondent No. 3 and 4, to grant refund of Rs. 39,86,126/- already recovered from the bank accounts of Petitioner's husband held with Respondent No. 5 and Rs. 10,031/- recovered from the bank account of Petitioner held with Respondent No. 8 and order payment interest on Rs. 39,86,126/- and Rs. 10,031/- from the date of recovery."

2. Facts in brief which has led to filing of this writ petition can be crystallized as under;

Petitioner is wife of Late. Sri. P.S. Harsha, who was the Proprietor of M/s. Rapid Marine Suppliers, Mangalore, (for short, "M/s. RMS"), and said Firm which was a proprietary concern was registered with the Service Tax Department under section 69 of the Finance Act, 1994, under the category of "Port services" and "Supply of Tangible Goods for use Service". The said Sri. P.S. Harsha namely, petitioner's husband is stated to have expired on 05.01.2015 leaving behind the petitioner and two children to succeed to his estate. On the death of her husband, petitioner is said to have approached the bank which her husband was conducting business, namely, the fifth respondent to claim the amount available in the Savings Bank Account as well as Current Account of the deceased as well as Firm. It is contended by the petitioner that officers of respondents 2 to 4 had entered the business premises of the Firm belonging to her husband on 11.03.2015 at 5.54 PM and searched the said premises and sought for certain details. According to petitioner, her father expired on 12.03.2015 and as such she was seeking time to furnish the details sought for by the respondents 2 to 4. However, on 12.03.2015, respondent No. 4 is said to have issued a letter to respondent No. 6 calling for certain particulars and also intimating respondent No. 6 by communication dated 12.03.2015 Annexure-K to divert amounts outstanding in the petitioner's husband account by drawing a demand draft in favour of third respondent. A recovery notice under Section 87 of the Finance Act, 1994 also came to be issued by fourth respondent to sixth respondent calling upon them to divert the funds which is outstanding in the account of petitioner's husband. Likewise, fourth respondent is stated to have dispatched/ issued communications and recovery notices to seventh respondent as per Annexures M and N, as also to eighth respondent as per Annexure-P. Fourth respondent has also issued a letter dated 16.03.2015 Annexure-R to fifth respondent directing that the amount in the credit of the Firm M/s. RMS be paid to third respondent. Questioning the action of issuance of recovery notices and contending inter alia that without there being any adjudication under Section 73 of the Finance Act, 1994 recovery notices under Section 87 of the Finance Act could not have been issued petitioners are before this court.

3. Respondents on being put on notice have entered appearance, filed their statement of objections defending the action of the respondents 1 to 4 by contending inter alia that Firm M/s. RMS which was a proprietary concern of deceased Sri. P.S. Harsha namely the husband of the petitioner had failed to pay

service tax of Rs. 36,48,659/- and interest on the same would amount to Rs. 10,81,000/- for the period 01.10.2009 to 30.09.2014 and he had also failed to file the statutory returns. It is also contended that out of the said amount, a sum of Rs. 24,98,451/- had been collected from the customers by the proprietor of the Firm M/s. RMS and had failed to remit the same to the Government. It is contended that quantification of the amount has been arrived at on the basis of ledgers submitted by the service receivers from the Firm. It is contended that to safeguard the Government revenue, recovery proceedings in terms of Section 87 of the Finance Act, 1994 and Rule 6(1) of Service Tax Rules, 1994 came to be initiated and amount of Rs. 39,96,157/- has been recovered towards service tax and interest liability of M/s. RMS amounting to Rs. 47,50,000/-. It is also stated that fifth respondent-Union Bank of India, Hunnur Branch, has paid the amount which was in the current Account of the Firm. Respondents have further contended that M/s. RMS failed to respond to the letters and summons issued since 06.07.2011 till April 2015 and investigation has been concluded on the basis of documents furnished by the service receivers of petitioner, as such, show cause notice has been issued on 22.04.2015 and it is at the stage of adjudication and there is no impediment for the petitioner to appear in the said proceedings. The petition averments have been traversed in the statement of objections and except to the extent expressly admitted in the statement of objections, all other averments made in the writ petition has been denied. Respondents have sought for dismissal of the writ petition.

4. I have heard the learned Advocates appearing for parties and perused the records.

5. It is the contention of Sri. K.S. Naveen Kumar, learned counsel appearing for the petitioner that recovery action initiated by fourth respondent and his subordinates is contrary to the provisions of Finance Act namely even before adjudication as contemplated under Section 73 is concluded, no recovery proceedings under Section 87 of the Finance Act, 1994 could be initiated by the respondents 2 to 4 and when there is no adjudication and quantification of the amount payable by the deceased husband of the petitioner, recovery notices issued to the constituents of the Firm is bad in law and liable to be quashed.

6. It is also contended that under Section 87 of the Finance Act, notice is required to be issued in writing that any other person from whom money is due or may become due to such person or holds or subsequently may hold money on account of such person is credited to the Central Government either forthwith, either money becoming due or being held or at or within the time specified in the notice and not being before the money becoming due and said provision would be applicable where only when such person who was supposed to pay tax, failed to pay and as such it is contended that when there is no determination or adjudication of the amount payable by "such person" initiation of proceedings under Section 87 of the Act would be contrary to Section 87. Hence, petitioners are seeking for the reliefs prayed for in the writ petition as already indicated

hereinabove.

7. Learned counsel appearing for petitioner has relied upon the following judgments:--

"1) 2013-TIOL-399-HC-KAR-ST:

GSP Infratech Development Ltd. v. UOI & Otrs.

2) R.V. Man Power Solution Vs. Commr. of Cus. and Central Excise, (2014) 45 GST 567 : (2014) 33 STR 23 : (2014) 69 VST 528

3) Gokak Patel Volkart Limited Vs. Collector of Central Excise, Belgaum, AIR 1987 SC 1161 : (1987) 11 ECC 363 : (1987) 28 ELT 53 : (1987) 1 JT 469 : (1987) 1 SCALE 361 : (1987) 2 SCC 93 : (1987) 2 SCR 309 : (1987) 1 UJ 627 .

4) Davanagere Cotton Mills Ltd. Vs. Chairman C.B.E. and C., (1993) 49 ECR 80 : (1991) 55 ELT 295 .

5) Chitra Builders (P) Ltd. Vs. Additional Commissioner of Customs, Central Excise and Service Tax and Another, (2013) 158 CTR 58 : (2014) 44 GST 677 : (2013) 31 STR 515 : (2013) 58 VST 471 ."

8. Per contra, Sri. N.R. Bhaskar, learned panel counsel appearing for respondents 2 and 4 whose action have been called in question in this writ petition would defend the recoveries already made and contends that in order to safeguard the interest of revenue, the admitted service tax which had been collected by the proprietor of the Firm M/s. RMS namely, husband of the petitioner which had not been remitted to the Government as required under the Finance Act, 1994 had resulted in investigation being conducted and after verification of the invoices and ledgers submitted by the service receivers, quantification has been done and as such the amounts have been recovered which is in consonance with the provisions of Finance Act, 1994 and particularly Section 87 and there is no infirmity what so ever committed by the respondents as such he prays for dismissal of the writ petition.

9. Having heard the learned advocates appearing for the parties and on perusal of the case papers as well as the case laws cited at the bar, this Court is of the considered view that only point that arises for consideration in this writ petition;

"Whether respondents 2 to 4 could have initiated recovery proceedings under Section 87 of Finance Act when there is no adjudication or quantification of the amount due and payable by the registered service tax provider?"

In order to adjudicate the point formulated hereinabove, it would be necessary to extract the relevant provisions of Finance Act, 1994 which have bearing and impact on the said point namely Section 73 and 87 of the Finance Act. They read as under:--

"73. Recovery of Service tax not levied or paid or short-levied or short-paid or erroneously refunded -

(1) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the Central Excise Officer may, within eighteen months from the relevant date, serve notice on the person chargeable with the service tax which has not been levied or paid or which has been short-levied or short-paid or the person to whom such tax refund has erroneously been made, requiring him to show cause why he should not pay the amount specified in the notice:

PROVIDED that where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of--

(a) fraud; or

(b) collusion; or

(c) willful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made thereunder with intent to evade payment of service tax,

by the person chargeable with the service tax or his agent, the provisions of this sub-section shall have effect, as if, for the words "eighteen months", the words "five years" had been substituted.

Explanation. -- Where the service of the notice is stayed by an order of a court, the period of such stay shall be excluded in computing the aforesaid period of eighteen months or five years, as the case may be.

[(1A) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, by reason of fraud, collusion or any wilful misstatement or suppression of facts, or contravention of any of the provisions of this Chapter or the rules made thereunder, with intent to evade payment of service tax, by such person or his agent, to whom a notice is served under the proviso to sub-section (1) by the Central Excise Officer, such person or agent may pay service tax in full or in part as may be accepted by him, and the interest payable thereon under Section 75 and penalty equal to twenty-five per cent of the service tax specified in the notice or the service tax so accepted by such person within thirty days of the receipt of the notice.]

(2)The [Central Excise Officer] shall, after considering the representation, if any, made by the person on whom notice is served under sub-section (1), determine the amount of service tax due from, or erroneously refunded to, such person (not being in excess of the amount specified in the notice) and thereupon such person shall pay the amount so determined:

PROVIDED that where such person has paid the service tax in full together with interest and penalty under sub-section (1A), the proceedings in respect of such person and other persons to whom notices are served under sub-section (1) shall

be deemed to be concluded:

PROVIDED FURTHER that where such person has paid service tax in part along with interest and penalty under sub-section (1A), the Central Excise Officer shall determine the amount of service tax or interest not being in excess of the amount partly due from such person.

(3) Where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded, the person chargeable with the service tax, or the person to whom such tax refund has erroneously been made, may pay the amount of such service tax, chargeable or erroneously refunded, on the basis of his own ascertainment thereof, or on the basis of tax ascertained by a Central Excise Officer before service of notice on him under sub-section (1) in respect of such service tax, and inform the Central Excise Officer of such payment in writing, who, on receipt of such information shall not serve any notice under sub-section (1) in respect of the amount so paid:

PROVIDED that the Central Excise Officer may determine the amount of short payment of service tax or erroneously refunded service tax, if any, which in his opinion has not been paid by such person and, then, the [Central Excise Officer] shall proceed to recover such amount in the manner specified in this section, and the period of "one year" referred to in sub-section (1) shall be counted from the date of receipt of such information of payment.

Explanation. -- For the removal of doubts, it is hereby declared that the interest under section 75 shall be payable on the amount paid by the person under this sub-section and also on the amount of short payment of service tax or erroneously refunded service tax, if any, as may be determined by the [Central Excise Officer], but for this sub-section.

(4) Nothing contained in sub-section (3) shall apply to a case where any service tax has not been levied or paid or has been short-levied or short-paid or erroneously refunded by reason of--

(a) fraud; or

(b) collusion; or

(c) wilful mis-statement; or

(d) suppression of facts; or

(e) contravention of any of the provisions of this Chapter or of the rules made there under with intent to evade payment of service tax.

(5) The provisions of sub-section (3) shall not apply to any case where the service tax had become payable or ought to have been paid before the 14th day of May, 2003.

(6) For the purposes of this section, "relevant date" means, --

(i) in the case of taxable service in respect of which service tax has not been levied or paid or has been short-levied or short-paid --

(a) where under the rules made under this Chapter, a periodical return, showing particulars of service tax paid during the period to which the said return relates, is to be filed by an assessee, the date on which such return is so filed;

(b) where no periodical return as aforesaid is filed, the last date on which such return is to be filed under the said rules;

(c) in any other case, the date on which the service tax is to be paid under this Chapter or the rules made there under;

(ii) in a case where the service tax is provisionally assessed under this Chapter or the rules made there under, the date of adjustment of the service tax after the final assessment thereof;

(iii) in a case where any sum, relating to service tax, has erroneously been refunded, the date of such refund.

[87. Recovery of any amount due to Central Government -

Where any amount payable by person to the credit of the Central Government under any of the provisions of this Chapter or of the rules made thereunder is not paid, the Central Excise Officer shall proceed to recover the amount by one or more of the modes mentioned below:--

(a) the Central Excise Officer may deduct or may require any other Central Excise Officer or any officer of customs to deduct the amount so payable from any money owing to such person which may be under the control of the said Central excise officer or any officer of customs;

(b)(i) the Central Excise Officer may, by notice in writing, require any other person from whom money is due or may become due to such person, or who holds or may subsequently hold money for or on account of such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held or at or within the time specified in the notice, not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount;

(ii) every person to whom a notice is issued under this section shall be bound to comply with such notice, and in particular, where any such notice is issued to post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;

(iii) in a case where the person to whom a notice under this section is sent, fails to make the payment in pursuance thereof to the Central Government, he shall

be deemed to be an assessee in default in respect of the amount specified in the notice and all the consequences of this Chapter shall follow;

(c) the Central Excise Officer may, on an authorization by the Commissioner of Central Excise, in accordance with the rules made in this behalf, distrain any movable or immovable property belonging to or under the control of such person, and detain the same until the amount payable is paid; and in case, any part of the said amount payable or of the cost of the distress or keeping of the property, remains unpaid for a period of thirty days next after any such distress, may cause the said property to be sold and with the proceeds of such sale, may satisfy the amount payable and the costs including cost of sale remaining unpaid and shall render the surplus amount, if any, to such person;

(d) the Central Excise Officer may prepare a certificate signed by him specifying the amount due from such person and send it to the Collector of the district in which such person owns any property or resides or carries on his business and the said Collector, on receipt of such certificate, shall proceed to recover from such person the amount specified thereunder as if it were an arrear of land revenue.]"

10. A perusal of Section 70 of the Finance Act would indicate that every person liable to pay service tax is required to assess the tax himself due on the services provided by him and is required to furnish to the jurisdictional Superintendent, written in such form and such manner with a late fee if necessary for delayed furnishing of the returns. Section 71 provide for scheme of submission of return through Service Tax Return preparer. Section 72 enables the Central Excise Officer to pass best judgment assessment. Section 73 of the Finance Act enables the jurisdictional Central Excise Officer to demand from the service providers to call upon such service provider to pay such tax where it has not been paid, levied or has been short levied or short paid or erroneously refunded. Sections 75 and 76 enables the Jurisdictional Central Excise Officer to impose interest and penalty for nonpayment of such amounts.

11. In the aforestated analysis, case on hand is to be examined. It is not in dispute that M/s. RMS which is a proprietary concern is the holder of the Registration Certificate issued by respondents 2 to 4 as per Section 69 of the Finance Act. It would emerge that on account of nonpayment of service taxes by M/s. RMS the respondents had issued show cause notices on 05.08.2009 and 19.10.2009 demanding service tax of Rs. 71,48,987/- for the period 2004-05 to 2007-08 and demanding service tax of Rs. 40,27,335/- for the period 2008-09 and undisputedly the said show cause notices is yet to be adjudicated. No reasons are forthcoming from the statement of objections as to why show cause notices are not yet adjudicated.

12. Be that as it may. Third show cause notice came to be issued on 22.04.2015 which has been appended to the statement of objections and perusal of the same would indicate that M/s. RMS has been issued with the said show cause notice

calling upon the service provider to pay the tax demanded thereunder relating to the period 01.07.2012 to 30.09.2014 and also the CESS for the period 01.10.2009 to 30.09.2014. The noticee, namely the service provider has also been notified that nonpayment of said amount demanded would result in interest and penalty being imposed/levied.

13. Much prior to the issuance of the said show cause notice, the proprietor of the said Firm Mr. P.S. Harsha expired on 05.01.2015 as is evident from the Survivorship Certificate produced at Annexure-B to the writ petition. Though, Petitioner feigns ignorance of issuance of such show cause notice, this Court would not embark upon conducting any enquiry in that regard. It is left to respondents to adjudicate the show cause notices in accordance with law.

14. However, even before said show cause notice came to be adjudicated, fourth respondent issued the impugned notice namely the recovery notices dated 12.03.2015, Annexure-L, N and P and recovery notice dated 16.03.2015 Annexure-R to respondents 6, 7, 8 and 5 respectively, which is in exercise of the power under Section 87(b) of the Finance Act, 1994. On perusal of the said provision which is already extracted hereinabove, it would clearly indicate that Central Excise Officer may, by notice in writing, require or call upon every person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of any such person, to pay to the credit of the Central Government either forthwith upon the money becoming due or being held or had or within the time specified in the notice as is sufficient to pay the amount due from such person. At this stage, the question that would arise for consideration is whether such notice could have been issued by the fourth respondent even before show cause notices were adjudicated or not.

15. Co-ordinate Bench of this court had an occasion to consider similar issue in the matter of GSP Infratech Development Ltd., v. Union of India and Others in W.P. Nos. 13781 & 14061/2013 (T-TAR) and held that Section 87 applies only after a proceeding under Section 73 is concluded by an order determining the amount due and payable by the petitioner. In the facts obtained in the said case it came to be held that such a situation had not arisen and there is no conclusion of the proceedings and as such Section 87 was held to be inapplicable. It has been held as under:--

"4 - Regarding being had to Section 73(1) of the Act, whereunder show cause notice, Annexure-A was issued to the petitioner, responded by the explanation Annexure-B, and no order having been passed thereon to conclude the proceeding as required by sub-section (2) of Section 73, while the proceeding, is pending before the 2nd respondent, then Section 73-C of the Act comes into play in the matter of provisional attached of the properties belonging to the petitioner. The contention that Section 87 (b)(in) of the Act is applicable, in my considered opinion, is without merit, since it applies only after a proceeding under Section 73 is concluded by an order determining the amount due and payable by the petitioner. Such a situation having not arisen as there is no conclusion of the

proceeding, Section 87 is inapplicable."

16. Perusal of Section 87 of the Act would clearly indicate that any amount due to the Central Government can be recovered by any one or more of the modes provided under Clauses (a) to (d) of Section 87 of the Act. The language employed under Section 87 of the Act would indicate that where any amount payable by a person to the credit of the Central Government under any of the provisions of the said Chapter or the Rules made thereunder is not paid, then the Central Excise Officer would be empowered to proceed to recover the amount by any one or more of the modes mentioned in clauses (a) to (d) of Section 87 of the Act. Thus, the words "amount payable by a person" will have to be considered in the background of Section 73 of the Act inasmuch as, show cause notice issued under Section 73(1) of the Act is required to be adjudicated after considering representation of the person if filed and thereafter determine the amount payable. Any deviation in this regard would be in violation of principles of natural justice or in other words, doctrine of Audi Alteram Partem would be attracted. Thus, jurisdictional Central Excise Officer would be entitled to recover the amount from the person payable and payable would by such person after adjudication has been done as otherwise, it would amount to putting the cart before horse. Rule 6A of the Service Tax Rules, 1994 would also indicate that where any amount of service tax payable has been self assessed under Section 117 of the Act but not paid, either in full or in part, the same shall be recovered along with interest in the manner prescribed under Section 87 of the Act.

17. It is not the case of the respondents 2 to 4 though registered service tax provider in the instant case namely, M/s. RMS had been assessed under Section 72 of the Finance Act, 1994. It is also not in dispute that show cause notice dated 22.04.2015 under Section 73 had been issued to M/s. Rapid Marine Suppliers. A perusal of the said show cause notice which is appended to the statement of objections filed by respondents would clearly indicate that even earlier show cause notice dated 05.08.2009 demanding service tax of Rs. 71,48,987/- payable for the period 2004-05 to 2007-08 had been demanded, followed by a further show cause notice dated 19.10.2009 demanding service tax of Rs. 40,27,335/- payable for the period 2008-09 which show cause notices were undisputedly pending adjudication even as on the date of issuance of the show cause notice dated 22.04.2015 referred to herein supra. Even without abovesaid two show cause notices being adjudicated, third show cause notice dated 22.04.2015 came to be issued demanding service tax, interest thereon and proposed to levy penalty which is also yet to be adjudicated. In other words, there is no determination or quantification of the amount due and payable by M/s. RMS. As such the recovery notices issued by respondent No. 4 dated 12.03.2015/16.03.2015 Annexure-L, N, P and R would amount to putting the horse before the cart or in other words, even before the adjudication or quantification of the tax amount is being done or concluded, fourth respondent has attempted to recover the amounts from the petitioner through issuance of garnishee notice to respondents 5, 6 7 and 8. Hence, they cannot be sustained.

18. Regard being had to the scheme of the Finance Act, 1994 it does not leave any doubt in the mind of this court that until and unless there is no determination and adjudication either under Section 72 or under Section 73 of the Act, respondents-2 to 4 cannot resort to invoke Section 87 of the Finance Act. When there is no adjudication order and undisputedly and concededly in the instant case, respondent No. 4 having issued a show cause notice to the service provider M/s. Rapid Marine Suppliers as contemplated under Section 73(1) of the Act for adjudicating the show cause notice by calling upon the service provider to show cause as to why the amounts as indicated in the show cause notice should not be recovered from it, has simultaneously proceeded to issue recovery notice to respondents 6 and 7 by calling upon them to remit the amounts held by them on behalf of the service provider.

19. The garnishee notices issued by respondents-2 to 4 on respondents-5 to 8 calling upon them to divert the funds which are held by them on behalf of M/s. RMS is not a provisional attachment as provided under Section 73(c) of the Act. In other words, it is not the case of respondents-2 to 4 that in exercise of the power vested under Section 73C of the Finance Act and to protect the interest of the Revenue and with the previous approval of the Commissioner of Central Excise (Commissioner of Service Tax) such attachment had been made. The perusal of the said garnishee notices would clearly indicates that respondents-5 to 8 have been called upon to divert the funds held by them on behalf of the service provider namely, M/s. RMS. The said garnishee notices would also indicate that in exercise of the power vested under Section 87(b) of the Finance Act, 1994 the monies are called for from the garnishees. This Court is of the considered view that power vested under Section 87(b)(i) & (ii) of the Finance Act, 1994 can be exercised only after adjudication of the show cause notice is concluded. In other words, resort to Section 87 of the Finance Act, 1994 can be had for recovering the amounts determined to be due from the service provider and not prior to that. The scheme of the Finance Act in general and Section 73C in particular, would clearly indicate that the authorities in order to protect the interest of the revenue can provisionally attach any property belonging to the person on whom notice is served under sub-section (1) of Section 73 or sub-section (3) of Section 73A as the case may be, during the pendency of any proceedings under Section 73. Undisputedly, in the instant case, show cause notices dated 05.08.2009, 19.10.2009 and 22.04.2015 having been issued to the service provider, has not yet been adjudicated and as such, respondents-2 to 4 could not have taken recourse to invoke Section 87 for recovering the amounts due from the service provider by issuance of garnishee notices to respondents-5 to 8.

20. Though the respondents have sought to defend such action on the ground that these amounts had been collected by the service provider and same had not been remitted to the department or to the account of the Central Government, the course left open to respondents-2 to 4 is as provided under Section 73(1) namely, adjudicating the show cause notices and thereafter on such adjudication,

resort to recover the amount so determined to be due from the service provider by taking steps as provided under Section 87. It cannot be gain said by the respondents that on the strength of the investigation conducted by them by enquiring with the service recipients, they are recovering the amounts reflected in the show cause notice dated 22.04.2015 by issuance of garnishee notices to respondents-5 to 8 and if such contention or plea is accepted, it would render the adjudication process itself otiose or nugatory, in as much as, in all cases the respondents can take a stand and contend that the investigation conducted by them is sufficient to recover tax even before adjudication is complete or even before the amount due is quantified. To put it differently, the adjudication of show cause notices after recovering alleged amounts due would be a post decisional hearing and would become an empty formality. Same not being the intention of the Parliament can be gathered from the scheme of the Act, as discussed herein above.

21. For the reasons aforesaid, it has to be necessarily held that recovery notices issued by the respondent No. 4 to respondents 6, 7, 8 and 5 as per Annexure M, N, P and R respectively as not tenable in law. On the other hand, it has to be held as illegal, contrary to the statutory provisions of the Finance Act, 1994 (amended from time to time) and as such they are liable to be quashed.

22. In view of the recovery made by the respondent No. 4 pursuant to the recovery notices Annexure L, N P and R respectively and same having been held to be illegal, consequential orders to direct the fourth respondent to remit the amount back to the respective accounts is required to be issued, since such recovery was without authority of law.

23. In view of quashing of impugned notices and consequential order having been passed as sought for in prayer C prayer B does not survive for consideration. For the reasons aforesaid, I proceed to pass the following

ORDER

"1). Writ petition is hereby allowed.

2). The recovery notice in C. No. IV/06219/2013-14 SIV-I Dt. 12.3.2015 in Annexure L, issued to sixth respondent, recovery letter in C. No. IV/06219/2013-14 SIV-I Dt. 12.3.2015 in Annexure N, issued to seventh respondent, communication/recovery Notice in C. No. IV/06219/2013-14 SIV-I dt. 12.3.2015 in Annexure P, issued to eighth respondent and communication/recovery notice in C. No. IV/06219/2013-14 SIV-I Dt. 16.3.2015 at Annexure R issued to fifth respondent are hereby quashed.

3). A writ of mandamus is issued to respondent No. 4 to remit the amount recovered under the impugned notices to the accounts of respective respondents forthwith."

No costs.

Ordered accordingly.