

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 19533 of 2019****FOR APPROVAL AND SIGNATURE:****HONOURABLE MS.JUSTICE HARSHA DEVANI****and****HONOURABLE MS. JUSTICE SANGEETA K. VISHEN**

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1	Whether Reporters of Local Papers may be allowed to see the judgment ?	
2	To be referred to the Reporter or not ?	
3	Whether their Lordships wish to see the fair copy of the judgment ?	
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	

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KUSHAL LTD.**Versus****UNION OF INDIA**

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Appearance:**UCHIT N SHETH(7336) for the Petitioner(s) No. 1,2****MR ANKIT SHAH(6371) for the Respondent(s) No. 1,2**

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CORAM:HONOURABLE MS.JUSTICE HARSHA DEVANI**and****HONOURABLE MS. JUSTICE SANGEETA K. VISHEN****Date : 17/12/2019****ORAL JUDGMENT****(PER : HONOURABLE MS.JUSTICE HARSHA DEVANI)**

1. By this petition under article 226 of the Constitution of India, the petitioners have challenged the provisional

attachment orders dated 18.10.2019 passed under section 83 of the Central Goods and Services Tax Act, 2017 and Gujarat Goods and Services Tax Act, 2017 (hereinafter collectively referred to as the “GST Acts”) provisionally attaching the bank accounts of the petitioners. The petitioners seek a further direction to the respondents to forthwith release the provisional attachment of other bank accounts of the petitioners copies of which have not been served upon the petitioners.

2. The petitioners are engaged in the manufacture and sale of paper and paper waste since the year 2000 and are also engaged in trading various commodities. The petitioners are listed with Bombay Stock Exchange and are duly registered under the GST Acts. According to the petitioners, they duly file returns and discharge tax liability under the GST Acts.

3. It is the case of the petitioners that they entered into certain transactions of sale of goods on “as is where is” basis in the year 2017-18. The goods were purchased from registered persons under the GST Acts on payment of tax under the GST Acts and they were in turn sold to other registered persons. Input tax credit was claimed of tax paid on purchases which was utilized towards payment of output tax liability and the differential tax amount was paid through electronic cash ledger.

4. On 27.9.2018, search proceedings came to be conducted by the Central Goods and Services Tax Department at the premises of the petitioners. An inquiry was made regarding the trading transactions of the petitioners and evidence was demanded regarding the purchase and sale transactions. The

petitioners intimated that the goods were sold on “as is where is” basis and thus, there was no evidence of movement of goods; however, the fact is that the goods were purchased from registered vendors. It is further the case of the petitioners that it was not in dispute that the said vendors had deposited the tax amount into the Government treasury which was duly reflected in Form GSTR-2A on the online portal. According to the petitioners, it was also not disputed that the petitioners deposited the differential amount of tax into the Government treasury on further supply of such goods.

5. Subsequently, summonses were issued to the second petitioner in the months of October and November, 2018. The second petitioner duly attended to such summons and his statement was recorded. A notice dated 17.12.2018 came to be issued to the petitioners calling for documents in relation to the investigation. The petitioners responded to such notice by a letter dated 22.1.2019 and the documents as required by the respondents were furnished. The petitioners reiterated that there was no evasion of tax under the GST Acts by them. After such correspondence, the respondents visited the premises again on 1.4.2019 for scrutiny of the same transactions. After verification, the second petitioner was called to the Commissionerate in the evening on the same day. When the second petitioner went as directed, he was issued an arrest memo under section 69 under the GST Acts and was thereafter immediately arrested.

6. The second petitioner thereafter applied for bail which was ultimately granted under section 167(2) of the Code of Criminal Procedure, 1973.

7. It is the case of the petitioners that after the arrest of the second petitioner on 1.4.2019, no notice had been issued to the petitioners with regard to the issue in question and no show-cause notice had been issued under section 73 or 74 of the GST Acts. It is the further case of the petitioners that despite the fact that no proceedings were pending under sections 62, 63, 64, 67, 73 or 74 of the GST Acts, the second respondent proceeded to provisionally attach the bank accounts of the petitioners in exercise of powers under section 83 of the GST Acts. According to the petitioners, the provisional attachment of their bank accounts under section 83 of the GST Acts is wholly without jurisdiction and illegal and hence, they have filed the present petition seeking the reliefs noted hereinabove.

8. Mr. Uchit Sheth, learned advocate for the petitioners invited the attention of the court to the provisions of section 83 of the GST Acts to submit that pendency of proceedings under the sections referred to therein is a *sine qua non* for exercise of powers under the said section. It was submitted that in the impugned orders of provisional attachment it is stated that the attachment was being made during the pendency of proceedings under section 67 of the GST Acts. It was pointed out that in this case, search proceedings were conducted at the premises of the petitioners on 27.9.2018 and thereafter, there was a visit by the respondents on 1.4.2019 which led to the arrest of the second petitioner. Thereafter, there has been no search at the premises of the petitioners. Thus, no proceedings are pending under section 67 of the GST Acts. It was submitted that therefore, the action of provisionally attaching the bank accounts of the petitioners in purported exercise of powers under section 83 of the GST Acts despite

the fact that on such date there was no pendency of search proceedings under section 67 of the GST Acts, is wholly without jurisdiction and illegal.

8.1 Next it was submitted that section 83 of the GST Acts is a drastic provision which can be invoked only if the authorities form an opinion that such attachment is necessary to protect the interest of the revenue. Reliance was placed upon the decision of this court in the case of **Vishwanath Realtor Vs. State of Gujarat** rendered on 29.4.2015 in Special Civil Application No.7210 of 2015, wherein the court has held that the formation of opinion is required to be made on the basis of tangible material on objective facts. The court further held that if on the basis of the past conduct of the dealer, the authorities believe that he would sell off his properties and defeat the claim of the revenue only then provisional attachment of properties is permissible. It was submitted that in this case, the second respondent has not recorded any such satisfaction in the impugned orders.

8.2 Next it was submitted that it is not disputed that the suppliers of the petitioners are registered vendors and they have deposited tax on supplies made to the petitioners into the Government treasury. This is so reflected on the online portal in Form GSTR-2A. It was further submitted that it is also not in dispute that the petitioners have deposited the differential amount of tax on further supply of goods into the Government treasury. The petitioners did not have the transportation evidences since the supplies took place on “as is where is” basis. However, it is not in dispute that the tax liability has been fully discharged and hence, the claim of input tax credit of the petitioners cannot be disallowed. It was

submitted that in any case, if at all it is established as alleged in the arrest memo that the petitioners had neither made purchases nor sales, then there is no question of the petitioners having any tax liability under the GST Acts. If the petitioners had not made any supplies under the GST Acts then whatever tax has been deposited with the Government is also excess tax.

8.3 It was, accordingly, urged that the impugned orders of provisional attachment being without authority of law, deserve to be quashed and set aside.

9. Opposing the petition, Mr. Ankit Shah, learned senior standing counsel for the respondents placed reliance upon the averments made in the affidavit-in-reply filed on behalf of the respondents. It was submitted that in the facts of the present case it was found that the petitioners were engaged in the business of trading of paper and electronics and had availed GST on the basis of only invoices and no goods were actually received by them. It was pointed out that during the course of inspection at the premises of the petitioners on 1.4.2019, the statement of Shri Sandeep Agarwal, Chairman and Managing Director of the company came to be recorded. During the course of investigation it was found that the first petitioner had availed of the input tax credit of Rs.88.78 crores on the strength of invoices issued by eighteen firms without having ever received the goods mentioned therein and the first petitioner also issued invoices amounting to Rs.88.94 crores to twenty seven firms without actual supply of the goods mentioned therein so as to enable the said twenty seven firms to avail illicit input tax credit without any physical movement of goods.

9.1 It was submitted that during the course of his statement on 30.11.2018, the petitioners had agreed to reverse the GST credit of Rs.32.79 crores taken on the strength of invoices issued by M/s. Emmar Trading Private Limited and M/s. CKP Industries where they had received only invoices and no physical goods were received by them. However, the GST amount is still unpaid.

9.2 It was submitted that the act of the second petitioner has enabled twenty seven companies to avail illicit input tax credit without any movement of goods merely based upon invoices issued by him thereby causing loss to the Government revenue of Rs.88.94 crores. It was submitted that this is a case where huge illicit input tax credit of Rs.88.78 crores is availed of by the company and input tax credit of Rs.88.94 crores has been illicitly passed on by the company and a huge amount of tax evasion has been detected so far in the investigation. It was submitted that therefore, in order to safeguard the Government revenue, the bank accounts of the petitioners company have been provisionally attached by the competent authority legally in accordance with law under section 83 of the GST Acts.

9.3 It was submitted that proceedings against the first petitioner are not yet completed till date as the petitioners have not deposited any amount since 1.4.2019. According to learned senior standing counsel, the proceedings under section 67 of the GST Acts are not yet completed and the matter is still under investigation. It was submitted that in view of the fact that the proceedings under section 67 of the GST Acts are not yet completed, the action of making provisional attachment

under section 83 of the GST Acts is in accordance with law.

9.4 It was, accordingly, urged that the petition being devoid of merits, deserves to be dismissed.

10. From the facts and contentions noted hereinabove, it emerges that a search came to be conducted under section 67 of the GST Acts on 27.9.2018, whereupon it was discovered that the petitioners had purchased goods and availed input tax credit thereon and had passed on input tax credit to various buyers by raising GST invoices without there being any actual movement of goods at their end either as recipient or as supplier. During the course of investigation, it was found that the petitioners were engaged in the business of trading of paper and electronics and had availed GST on the basis of only invoices and no goods were actually received by them. It appears that according to the respondents, investigation pursuant to the search conducted under section 67 of the GST Acts is still going on and therefore, according to the respondents, the proceedings under section 67 of the GST Acts are not yet completed.

11. Section 67 of the GST Acts to the extent the same is relevant for the present purpose reads as under:-

“67 Power of inspection, search and seizure.- (1)
Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.

(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:

Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.

(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice."

12. In the present case, since the premises of the petitioners

came to be searched, the provisions of sub-section (2) of section 67 of the GST Acts would be attracted. In terms thereof, pursuant to an authorisation issued in this behalf, the proper officer may search the premises in respect of which the search is authorised and seize goods, documents or books or things and retain the documents or books or things so long as may be necessary for any inquiry or proceedings under the Act. In the present case, search proceedings were conducted at the premises of the petitioners on 27.9.2018. Thereafter, there was a visit by the respondents on 1.4.2019 which led to the arrest of the second petitioner. Thereafter, no search has been conducted at the premises of the petitioners. The search proceedings have, therefore, ended. It is the case of the respondents that proceedings under section 67 of the GST Acts are not yet completed and the matter is still under investigation. In the opinion of this court, it may be that pursuant to the search, inquiry or other proceedings under the Act may have been undertaken; however, such inquiry or other proceedings are not under section 67 of the GST Acts and hence, it cannot be said that any proceedings are pending under section 67 of the GST Acts.

13. In this case, the orders of provisional attachment have been made under section 83 of the GST Acts which reads as under:-

83 Provisional attachment to protect revenue in certain cases. - (1) *Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, 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 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).

14. On a plain reading of section 83 of the GST Acts, it is clear that a *sine qua non* for exercise of powers thereunder is that proceedings should be pending under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 of the GST Acts. In the present case, the proceedings under section 67 of the GST Acts are no longer pending and pursuant to the search, proceedings under any of the other sections mentioned in section 83 have not been initiated. Under the circumstances, on the date when the orders of provisional attachment came to be made, the basic requirement for exercise of powers under section 83 of the GST Acts was not satisfied. The provisional attachment of the bank accounts of the petitioners under section 83 of the GST Acts is, therefore, not in consonance with the provisions thereof and cannot be sustained.

15. While, on behalf of the petitioners it has been contended that there is no question of disallowance of input tax credit merely on the ground that the petitioners have not actually received the goods at their premises and that the petitioners have adjusted such input tax credit against tax liability on sales made by them; that there is no allegation that the petitioners have illegally benefitted from such input tax credit; and that the petitioners are not liable to pay any amount under the GST Acts; however, such contentions are beyond the scope of the present petition which relates to the orders of provisional attachment dated 18.10.2019 passed under section

83 of the GST Acts and hence, it is not necessary to enter into the merits of such contentions, leaving it open to the petitioners to raise such contentions in appropriate proceedings before the appropriate forum.

16. As discussed hereinabove, in the absence of pendency of any proceedings under sections 62, 63, 64, 67, 73 or 74 of the GST Acts, the orders of provisional attachment of the bank accounts of the petitioners under section 83 of the GST Acts are without authority of law and are rendered unsustainable.

17. For the foregoing reasons, the petition succeeds and is accordingly allowed. The impugned orders of provisional attachment dated 18.10.2019 passed under section 83 of the GST Acts are hereby quashed and set aside and the respondents are directed to forthwith release the attachment over the said bank accounts as well as the bank accounts listed at Annexure-B to the petition.



(HARSHA DEVANI, J)

(SANGEETA K. VISHEN, J)

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