

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 618 of 2019**=====
MESSRS MONO STEEL (INDIA) LTD

Versus

STATE OF GUJARAT
=====

Appearance:

AMAL PARESH DAVE(8961) for the Petitioner(s) No. 1,2

MR PARESH M DAVE(260) for the Petitioner(s) No. 1

MR PARESH M DAVE(260)-G/425/1986 for the Petitioner(s) No. 2

MR. SOHAM JOSHI, ASST. GOVERNMENT PLEADER(1) for the
Respondent(s) No. 1,2,3NOTICE SERVED BY DS(5) for the Respondent(s) No. 4
=====CORAM: **HONOURABLE MR.JUSTICE J.B.PARDIWALA**

and

HONOURABLE MR. JUSTICE BHARGAV D. KARIA**Date : 09/01/2020****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)**

1. Rule returnable forthwith. Mr. Joshi, the learned AGP, waives service of notice of rule for and on behalf of the respondents.

2. By this writ application under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs;

“(A) That Your Lordships may be pleased to issue a Writ of Certiorari or Mandamus or any other appropriate writ, direction or order thereby quashing and setting aside orders for attachment of Petitioner's bank accounts, bearing Ref. No.ZA2412180016670 and Ref. No.ZA2412180016675R, both dated 27.12.2018 (Annexure-“L”) and also other attachment orders made by the 3rd Respondent herein for other bank accounts of the Petitioner.

(B) That Your Lordships may be pleased to issue a Writ of Mandamus or any other appropriate writ, direction or order thereby directing the Petitioner's Bankers to allow the Petitioner to operate the bank accounts in the normal manner without giving effect to the provisional attachment orders made by the Deputy Commissioner of GST-State;

(C) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the Deputy Commissioner of GST-State i.e. the Respondent No.3 herein, to forthwith instruct the Petitioner's Bankers to allow the Petitioners to operate the bank accounts in normal course of business, and be further pleased to stay implementation and execution of all attachment orders made by the 3rd Respondent herein.

(D) Pending hearing and final disposal of the present petition, Your Lordships may be pleased to direct the Petitioner's bankers to allow the Petitioner to operate the bank accounts in the normal course of business, thereby, staying further implementation and execution of attachment orders;

(E) An ex-parte ad-interim relief in terms of Para 21 (C & D) above may kindly be granted;

(F) Any other further relief that may be deemed fit in the facts and circumstances of the case may also please be granted."

3. The facts, giving rise to this writ application, as pleaded in the memo of the writ application, are as under;

"4.1 The Petitioner has established a factory at the address shown in the cause title of the present petition for manufacture of iron and steel products like Sponge Iron, M.S. Billets, TMT Bars and the like. The Petitioner has commenced commercial production in the factory around December, 2005, and the Petitioner has been continuously manufacturing the above referred goods in the factory on regular basis.

The Petitioner is a fairly large entity in terms of

manufacture and sale of goods. In F.Y. 2017-18, the total sales of the Petitioner Company have been aggregating to Rs.1229.52 crores (rounded of). A statement showing details of the Petitioner's soles and other income during last five years is enclosed and marked as Annexure-"A" to this petition.

The Petitioner has been contributing substantially to the Government exchequer by paying duties and taxes like Central Excise, Service Tax, Value Added Tax etc. In year 2017-18. the Petitioner has paid Central Excise duties aggregating to Rs.158.03 crores (rounded of), whereas VAT and CST paid by the Petitioner in year 2016-17 has been to the tune of Rs.25.16 crores (rounded of). After introduction of GST with effect from 1.7.2017, the Petitioner has paid substantial amount of SGST and CGST also. Three statements containing details of payments of excise duty, VAT and CST, and CGST and SGST made by the Petitioner for last few years are enclosed and marked as Annexure-"B" to this petition.

The above referred details would show that Petitioner's is an established industry, and the Petitioner has been conducting the business operations in proper manner thereby contributing to the Government exchequer to a large extent.

5. For manufacture of goods like Sponge Iron, the Petitioner has installed in the factory four Kilns, for processing raw material like Iron Ore therein. Another raw material, namely, Coal, which is in the nature of a consumable, is also used in such kilns for processing iron ore. The Petitioner has been regularly procuring by way of purchases from importers, substantial quantities of coal for manufacturing operations in the factory.

6. Prior to 1.7.2017, coal was classifiable under Heading 2701 of the Customs Tariff when imported in India, and under Heading 2701 of the Central Excise Tariff if coal was produced in India. For ready reference. extracts of Chapters 27 of the Central Excise Tariff as it stood prior to 1.7.2017 are enclosed and marked as Annexure-"C".

When iron ore and coal were processed in kilns for manufacturing goods like Sponge iron, obviously residue

of coal would arise as a result of manufacturing process in the kilns; and such residue of coal also retained a very low calorific value indicating the parameter of Volatile Matter (VM), which is the capacity or capability of the product for burning and generating heat. Ordinarily, VM parameter of normal or ordinary coal is found to be in excess of 25, whereas the same parameter of VM residue of coal arising after the manufacturing process in the kiln is very low, ranging between 2 to 4, but not in excess of 5. The residue of coal so obtained is described in the general trade by various nomenclatures like "Dolachar" "ChaLCoal" "Waste Coal" etc. Such coal waste contains high quantity of ash because of burning of coal and iron are in a kiln. Specimen test reports of coal procured by the Petitioner indicating general value of volatile matter and ash content and also test reports showing similar parameters of Dolachar/Char Coal are enclosed and marked as Annexure-"D".

7. Prior to 1.7.2017, slag, ash and such wastes arising as a residue from burning or incineration of coal, lignite, peat or oil were classified under Heading 26.21 of the Central Excise Tariff. Extracts of Chapter 26 of the Central Excise Tariff as it stood prior to 1.7.2017 are enclosed and marked as Annexure-"E".

The Central Government had granted exemption from payment of Central Excise duty for goods of Heading 26.21 of the Tariff, and therefore no excise duty was chargeable on Dolachar/Char Coal/Coal waste prior to 1.7.2017

Since coal waste has been arising in the Petitioner's factory as a result of burning and accompanying operations in kilns, the Petitioner has been disposing of such waste coal by selling the same to small time brick producers and similar traders, who could use such waste coal, though having a very low calorific value and quite high ash content. There being no liability to pay excise duty on such waste coal, classifiable under Heading 26.21 of the Central Excise Tariff, the Petitioner', and all similarly situated manufacturers, were not paying any excise duty on sale of coal waste i.e. Dolachar/Char Coal. Specimen tax invoices issued by the Petitioner for selling coal waste for the period prior to July. 2017 are enclosed and marked as Annexure-"F" Colly.

There is no dispute on the fact that waste coal sold by the Petitioner prior to July, 2017 was never charged to excise duty, and that the product fell under Heading 26.21 of the Central Excise Tariff not attracting any actual liability for payment of Central Excise duty.

8. *From 1.7.2017, however, GST Laws have come into operation; and a new Tariff, known as a GST Tariff of India is framed by the Parliament. GST Tariff is fully based on Harmonised System of Nomenclature (HSN), the way Customs Tariff and Central Excise Tariff have been broadly based on HSN. Heading 2701 of GST Tariff covers coal whereas Heading 2621 of GST Tariff covers other slag, ash, and such wastes. Extracts of Chapters 26 and 27 of the GST Tariff are enclosed and marked as Annexure-“G”.*

8.1 *Heading Nos. 2621 and 2701 of HSN are parimateria corresponding Headings of same numbers in GST Tariff. However, Explanatory Notes have been provided under HSN, and such Notes under Heading 26.21 clarify that ash produced primarily from burning the coal, lignite, peat or oil were covered under the said Heading No.26.21. Such Notes under Heading 27.01 of HSN clarify that the said classification was for various types of coal and anthracite. Extracts of Explanatory Notes under Heading 27.01 of HSN are enclosed and marked as Annexure“H”.*

8.2 *It is clear from the above referred Notes of HSN that waste coal, also known and described as Dolachar/Char Coal, falls for classification under Heading 26.21 of GST Tariff, and accordingly such waste coal has been chargeable to 9% CGST and 9% SGST: the total liability of GST being that of 18% Adv, However, no Compensation Cess is chargeable on goods of Heading 2621 of GST Tariff.*

But, owing to a sheer inadvertent error, which has occurred without the Petitioners even realizing about such error, waste coal is shown as a product falling under Heading No.27012090 of HSN-Code i.e. GST Tariff in the invoices issued by the Petitioner for sale and supply of waste coal from Jul, 2017 onwards. A few specimen invoices issued by the Petitioner for waste coal after July,

2017 are enclosed as Annexure-“I”.

Since total GST liability for goods of the above classification i.e. 27012090 has been 5% Adv, the Petitioner has discharged such GST liability also on waste coal sold from July, 2017 onwards.

8.3 However, waste coal is not “coal”, and therefore it actually does not merit classification under Heading 2701, Sub Heading 27012090, and therefore the liability of Compensation Cess at the rate of 400 per Ton otherwise imposed on coal of Heading 2701 has not been paid by the Petitioner. The fact that Compensation Cess is not paid on waste coal is also clearly shown in the invoices of the Petitioner, which have been submitted before the proper GST Offices in accordance with the procedure laid down under the GST law. This position i.e. paying total 5% GST on waste coal in accordance with the rates of GST prescribed against S.H.No.27012090, but not paying Compensation Cess has continued till now in the Petitioner’s case. The Petitioners know and understand for sure that other similarly situated manufacturers of Kutch area have also followed the same method of classifying coal waste i.e. Dolachar/Char Coal under HSN Code No.27012090 from July, 2017, and paying GST at the rate of 5% Adv. without paying any Compensation Cess.

9. On 31.10.2018, Officers of SGST Office i.e. the 3rd Respondent herein, visited the Petitioner’s factory and verified the statutory documents including invoices of waste coal. In view of this enquiry and also subsequent discussion between the parties, a Show Cause Notice bearing reference No.RNZA2412180014865 dated 21.12.2018 has been served Upon the Petitioner by the 3rd Respondent herein thereby suggesting that a total sum of Rs.1.22 crores (rounded of) was recoverable on sales and supplies of waste coal made from July, 2017 onwards as Compensation Cess @400 PMT along with interest and penalty. It is stated in this show cause notice that the Petitioner has shown HSN Code 27012090 in the invoices, but not collected Compensation Cess on such supplies, and hence non-payment of Compensation Cess has arisen. A copy of this show cause notice bearing reference No.RNZA2412180014865 dated 21.12.2018 is enclosed and marked as Annexure-“J”.

A further Show Cause Notice bearing Ref.No.ZA241218001634X dated 26.12.2018 has also been served Upon the Petitioner by the 3rd Respondent herein raising the same issue of non-payment of Compensation Cess on supplies of waste coal made from April, 2018 onwards, and also raising another issue of allegedly availing Input Tax Credit (ITC) for certain taxable supplies received by the Petitioner though no GST was paid or payable on the corresponding output supply. A copy of this show cause notice dated 26.12.2018 is enclosed and marked as Annexure-“K”.

Both these show cause notices are pending for adjudication; the Petitioner has not filed replies to the show cause notices so far because of further actions taken by the Respondents immediately thereafter. and no assessment orders are made by the adjudicating authority on these two show cause notices.

10. Immediately after issuing the above referred two show cause notices, the 3rd Respondent has issued communications/orders to the Petitioner's Bankers, including the 4th Respondent herein, thereby ordering provisional attachment of the Petitioner's bank accounts. Two provisional attachment orders, both dated 27.12.2018, have been served upon the 4th Respondent Bank Manager, but the copy thereof is not even communicated to the Petitioners: though the Petitioners have received copies of these orders dated 27,12.2018 from their Banker. Copies of these two orders bearing Ref.No.ZA241218001667O and Ref.No.ZA2412180016675R, both dated 27.12.2018 are enclosed and marked as Annexure-“L”.

10.1 Similar attachment orders have been made by the 3rd Respondent herein for the Petitioner's other bank accounts with the Bank of Baroda and Dena Bank; and attachment orders for the Petitioner's accounts with these banks have also been served upon the Managers of these banks by the 3rd Respondent herein. Consequently, bank accounts of the Petitioner with these banks, namely, Bank of Baroda and Dena Bank, also stand attached, and consequently in operational. However, the attachment orders served upon the Managers of Bank of Baroda and Dena Bank are not available with the

Petitioner, because copies of such attachment orders have also not been marked or communicated to the Petitioner by the 3rd Respondent herein.

As a result of these orders made by the 3rd Respondent herein, the Petitioner's bank accounts and facilities like Cash Credit (ie. CC Account facility) etc. are suspended, and the Petitioner's banking facility and the like have become in operational. The business and the financial transactions of the Petitioner have come to a grinding halt.

11. Upon receiving the information from the bankers about the attachment orders above referred, the Petitioners personally met the 1st Respondent herein and submitted before him a representation on 1.1.2019Q requesting for his intervention in the matter. A copy of this representation/application has also been submitted before the 3rd Respondent herein on 1.1.2019. A copy of this representation/request letter dated 1.1.2019 is enclosed and marked as Annexure-"M".

The Petitioners have met all the three Respondents herein representing the GST Department, i.e. Respondent Nos. 1, 2 and 3 herein, on several occasions thereafter: but such requests of the Petitioners for lifting and removing the attachment orders in respect of the bank accounts have not been considered, nor is any positive action taken by any of these Respondents on the Petitioner's requests made during the personal meetings. The Petitioners submissions that the product in question, i.e. waste coal, would actually not fall under Heading No.2701 of GST Tariff and hence Compensation Cess @ Rs.400 PMT was actually not chargeable thereon and also that the demand raised in the second show cause notice in respect of ITC was highly excessive, have also not been considered by the Respondents. The attachment of bank accounts still continues.

12. In the meanwhile, upon realizing the inadvertent error of classifying waste coal under S.H.No.27012090 instead of the correct classification of S.H.26219000, the Petitioners have calculated the actual amount of CGST and SGST payable on all sales and supplies of waste coal made from July, 2017 onwards; and such differential GST amount aggregating to Rs.49,79,616/- has been paid to

the credit of the GST Department by debiting legally admissible and availed ITC in the petitioner's statutory Credit Register. The Petitioners have also calculated the actual amount of ITC reversible in respect of the additional issue raised in the second show cause notice dated 26.12.2018, and such amount calculated in accordance with R.42 of the CGST Rules being Rs.4,22,496/- has also been paid by the Petitioner.

13. But the bank accounts of the Petitioner Company are still not allowed to be operated, and the attachment orders made by the 3rd Respondent herein still continue, and therefore the Petitioners are constrained to approach this Hon'ble Court for appropriate orders. directions and protection in the peculiar facts of this case. “

4. On 17th January, 2019, this Court passed the following order;

“1. Mr. Paresh Dave, learned advocate for the petitioner has submitted that for recovery of a sum of rupees three crore and odd, six bank accounts of the petitioner have been provisionally attached by issuing notices under section 83 of the Gujarat Goods and Services Tax Act, 2017, to the concerned banks. It was submitted that the show cause notices have been issued on 21st and 26th December, 2018 and immediately thereafter, the orders of provisional attachment have been made. The learned advocate has submitted a statement showing the details of the bank accounts of the petitioner, which indicates that the petitioner has a large amount of cash lying at its disposal with the concerned banks.

2. A perusal of the record of the case reveals that the petitioner is not a fly by night operator and has paid duty and tax to the tune of more than rupees one hundred crore in the last year. Under the circumstances, the respondent shall explain the expediency and the rationale behind ordering attachment of all the bank accounts of the petitioner and virtually bringing its business to a grinding halt.

3. Having regard to the submissions advanced by the learned advocate for the petitioner, Issue Notice returnable on 23rd January, 2019. In the meanwhile, by

way of ad-interim relief, the respondent is directed to forthwith release the attachment over the bank accounts of the petitioner, subject to the petitioner maintaining an amount of Rs.4,00,00,000/- in its Account No.117013011046 with the Dena Bank, Ahmedabad. Direct Service is permitted today.”

5. The plain reading of the order passed by a Coordinate Bench of this Court dated 17th January, 2019 would indicate that the attachment of the bank accounts was ordered to be released subject to the writ applicant maintaining an amount of Rs.4 Crore in its Account No.117013011046 with the Dena Bank, Ahmedabad. It has been almost one year since the order came to be passed by the Coordinate Bench, granting interim relief in favour of the writ applicant. Even, otherwise, the life of an order of provisional attachment under Section 83 of the Act is one year. This period of one year has already come to an end on 27th December, 2019. No fresh order of any provisional attachment of the bank accounts has been passed, more particularly, in view of the interim order passed by the Coordinate Bench dated 17th January, 2019, referred to above.

6. Manifold contentions have been raised by Mr. Paresh M. Dave, the learned counsel appearing for the writ applicant while challenging the action on the part of the respondents in passing the order of provisional attachment of the two bank accounts. In fact, there are many larger issues involved in this matter and have been resolved in the decision of this Court in the case of **Valerius Industries vs. Union of India**, Special Civil Application No.13132 of 2019, decided on 28.8.2019. Keeping in mind the time period that has elapsed, the interim order passed by the Coordinate Bench and the fact that the life of the order of the provisional attachment has come to an end,

it will be an exercise in futility now to adjudicate this writ application on merits. We would like to dispose of this writ application balancing the equities. In other words, while granting appropriate relief to the writ applicant, we would also ensure that the interest of the State is protected.

7. it is not even necessary now to quash the impugned order of the provisional attachment passed under Section 83 of the Act as the validity period has come to an end.

8. We dispose of this writ application with a direction that the writ applicant shall maintain, at all time, a stock worth minimum sum of Rs.4 Crore till the final disposal of the adjudication proceedings arising out of the show-cause notice dated 21st December, 2018 and 26th December, 2018 respectively. All the defenses available to the writ applicant in response to the two show-cause notices, referred to above, are kept open. Although, it is not necessary to clarify, still to avoid any confusion, we observe that the provisional attachment of the two bank accounts stands removed.

Direct service is permitted.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

Vahid