NEUTRAL CITATION
2018:GUJHC:14693-DB

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4835 of 2018

[On note for speaking to minutes of order dated 19/04/2018 in R/SCA/4835/2018]

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M/S. REMARK FLOUR MILLS PVT. LTD.

Versus

STATE OF GUJARAT

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Appearance:
KUNTAL A PARIKH(7757) for the PETITIONER(s) No. 1,2
NOTICE SERVED BY DS(5) for the RESPONDENT(s) No. 1,2

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CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 02/05/2018
ORAL ORDER
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

Through this note, it is pointed out that in our order dated 19.04.2018, in para 3, there has been an inadvertent typographical error which would change the very complexion of the petitioner's contention. Accepting the suggestion, it is provided that the second sentence of para 3 would be corrected and read as under:

"According to the petitioners, packings of more than 25 kgs are unbranded goods, the rest are branded."

Note is disposed of.

(AKIL KURESHI, J)

(B.N. KARIA, J)

JYOTI V. JANI

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IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

R/SPECIAL CIVIL APPLICATION NO. 4835 of 2018

FOR APPROVAL AND SIGNATURE:

HONOURABLE MR.JUSTICE AKIL KURESHI
and
HONOURABLE MR.JUSTICE B.N. KARIA

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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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M/S. REMARK FLOUR MILLS PVT. LTD.
Versus
STATE OF GUJARAT

==========

Appearance:
MR B N SOPARKAR, SR ADV. WITH MR KUNTAL A PARIKH(7757) for the PETITIONER(s) No. 1,2
MR CHINTAN DAVE, AGP for the RESPONDENT No. 1,2

==========

CORAM: **HONOURABLE MR.JUSTICE AKIL KURESHI**
and
HONOURABLE MR.JUSTICE B.N. KARIA

Date : 19/04/2018
ORAL JUDGMENT
(PER : HONOURABLE MR.JUSTICE AKIL KURESHI)

1. Petitioners have challenged three separate actions of the departmental authorities, though all of them arise out of one integrated set of facts.

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2. Briefly stated the facts are as under:

Petitioner No.1 is a company registered under the Companies Act. Petitioner No.2 is one of its share holders. Petitioner-company is engaged in supply of wheat flour, meslin flour, cereal flour etc. Such activity would invite SGST and CGST at prescribed rates. However, even this is a matter of dispute between the two sides.

3. Case of the petitioners is that they are supplying such goods in packets which are branded as well as unbranded. According to the petitioners, the packings of more than 25 kgs are branded goods, the rest are unbranded.

4. On 20.02.2018, the departmental authorities visited the petitioners' work premises and noticed that the petitioners were not paying any tax either on branded or unbranded goods. According to the petitioners, under threat and coercion, the departmental authorities collected three cheques for a total amount of Rs. 19,74,886/-. The petitioners, however, instructed the bank not to clear the cheques. Accordingly, when the departmental authorities produced such cheques for realization, they were returned by the bank. This is a first grievance of the petitioners of the departmental authorities having forcibly collected cheques even before the petitioners' tax liability was ascertained.

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5. On 27.02.2018, the department did two things (i) A show-cause notice was issued calling upon the petitioners why CGST and SGST totalling to Rs. 36,88,706/- not be recovered for the period between July 2017 and 20.02.2018; (ii) Simultaneously, on the same date, the department wrote to the petitioners' banks-Union Bank of India, Nizampura Branch, Baroda and IDBI Bank, Alkapuri Branch, Baroda provisionally attaching the petitioners' said bank accounts and instructed the banks not to allow the petitioners to operate the accounts without the prior permission of the department. The petitioners have challenged this provisional attachment orders of the departmental authorities.

6. On 19.03.2018, the adjudicating authority issued fresh notice under the purported exercise of powers under section 74(3) of the Central Goods and Services Tax Act calling upon the petitioners to show cause why a sum of Rs. 1,29,13,928/- towards CGST and SGST not be recovered from the period between July 2017 and 20.02.2018. This second show-cause notice, the petitioners have challenged on the ground of lack of jurisdiction.

7. We have heard learned counsel for the parties at considerable length. We will address to these three grievances of the petitioners one after another. With respect to the collection of three cheques for a sum of Rs. 19,74,886/-, the action of the department cannot be countenanced. It has been held by this

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Court and other High Courts of the country that the practice of collecting post-dated cheques under coercion during raid is not permissible means of collection of revenue particularly, when no tax demand has been confirmed or crystallized. Reference in this respect is made to an order dated 14.02.2014 passed by the Division Bench of this Court in case of ***Atul Motors Pvt. Ltd and anr vs. State of Gujarat and anr*** in Special Civil Application No. 959 of 2015. This is not to suggest that in a given case if the assessee voluntarily gives such cheques in order to avoid harsher measures of provisional attachment of premises, stock or bank accounts, the action of the authorities must fail in such a case also. However, in our experience such instances are few and far between.

8. In the present case, there does not appear to be any justification of the departmental authorities to collect and the petitioners to voluntarily give cheques for the said amount. We would therefore, direct the department to return such cheques.

9. We now take the petitioners' second challenge for consideration viz. to the second show-cause notice dated 19.03.2018. We may recall, the Adjudicating authority had already issued a show-cause notice on 27.02.2018 asking the petitioner to show cause why for the period between July 2017 and 20.02.2018 unpaid CGST and SGST of Rs. 30,88,706/- not be recovered. The second impugned show-cause notice also pertains to the same period and same demand of unpaid

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taxes only the figure now proposes is Rs. 1,29,13,928/-. The crucial question is, could the department have issued such a notice in purported exercise of powers under section 74(3) of the CGST Act.

10. Chapter XV of the Central Goods and Services Tax Act pertains to demands and recovery. Section 73 contained in the said chapter pertains to the determination of tax unpaid or short paid or erroneously refunded or input tax credit wrongly availed or utilized for any reason other than fraud or willful misstatement or suppression of facts. This section thus provides the procedure for determination of tax which has remained unpaid on the ground other than fraud, willful misstatement or suppression of facts. Section 74 of the Act on the other hand, pertains to determination of tax unpaid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts, relevant portion of which reads as under:

"**74. Determination of tax unpaid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any willful misstatement or suppression of facts:**

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful-misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with

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tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under sub-section (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice."

11. Under sub-section (1) of section 74 of the Act thus, if the proper officer would issue notice for recovery of unpaid tax etc. on account of fraud, willful misstatement or suppression of facts why the amount specified in the notice should not be recovered with interest and penalty. Sub-section (2) of section 74 provides for the time limit for issuance of such notice. Sub-section (3) of section 74 on the other hand, would authorize

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the proper officer to serve a statement containing the details of tax unpaid, shortly paid or erroneously refunded for a period other than i.e. covered under sub-section (1) where a notice has been issued for any period. Under sub-section (1) of section 74. In clear terms thus, powers under sub-section (3) of section 74 would be available where notice has already been issued against the person chargeable with tax under sub section (1) and the statement referred to in sub-section (3) of section 74 would be containing the details of tax unpaid, short paid etc. for purpose other than those covered under sub-section (1). In other words, powers under sub-section (3) of section 74 cannot be exercised for expanding or enlarging the liability arising out of show-cause notice under sub-section (1) from the same period. Essentially, sub-sections **(1) and (3)** of section 74 are envisaged to cover separate periods.

12. In that view of the matter, the respondents are wholly incorrect in issuing a fresh show-cause notice for the same period of July 2017 to 20.02.2018, which notice was already issued under sub-section (1) of section 74 of the Act purportedly under exercising powers to suggest that once a notice has been issued under sub-section (1) of section 74 of the Act, if the authorities find that the liability of tax, interest or penalty larger than one indicated in the statement referred to in sub-section (1) is likely to arise, the competent authority is remedy-less. However, his remedy does not lie in issuing second notice under sub-section (3) of section 74 of the Act.

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The impugned notice dated 19.03.2018 therefore, shall have to be quashed.

13. Coming to last surviving question of attachment of bank accounts, broad facts may be recapitulated thus. As per the notice dated 27.02.2018, as per the departmental authorities, the petitioners had not paid GSTs on branded goods. The tax liability would be Rs. 36,88,706/-. There could be possible interest and penalty liability on such tax amount. It prima facie appears that the department had issued second show-cause notice dated 19.03.2017 (which we propose to quash) including even the unbranded goods for recovery of GSTs. Having perused the relevant literature, we even otherwise find that GSTs on unbranded goods has been specifically exempted. As of now, thus, only notice for recovery of tax that survives is one seeking to recover GSTs of Rs. 30 lacs approximately with interest and penalty. At the same time, we must also realize that if the petitioners are not correct in contending that no service tax can be levied on branded goods because the brand belongs to the directors of the company, such liability may eventually arise with interest and matching penalty.

14. In this background, we may peruse the provisions of section 83 of the CGST Act which reads as under:

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"**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)."

15. Under sub-section (1) of section 83 thus, the competent authority has power of provisional attachment, where during pendency of any proceedings under the Act he is of the opinion that for the purpose of protecting the interest of government revenue, it is necessary so to do. Such provisional attachment could be of any property including the bank account of the taxable person. Sub-section (2) of section 83 however, provided that every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of which such order has been made. Similar provisions contained in the VAT Act concerning provisional attachment came up for consideration before Division Bench of this Court in case of ***Automark Industries (I) Ltd vs. State of Gujarat*** reported in **2014 SCC Online Gujarat 14217**. The Court made following observations:

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"8. Section 45 of the VAT Act empowers the Commissioner during pendency of any proceedings of assessment or reassessment of turnover escaping assessment, to attach provisionally any property belonging to any dealer, if he is of the opinion that for the purpose of protecting the interest of Government revenue, it is necessary to do so. As per subsection (2) of Section 45, 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 subsection (1). Few things emerge from these statutory provisions. Firstly, the power of provisional attachment is in the nature of an extraordinary measure available to the revenue authorities for the purpose of protecting interest of Government revenue. Even before any assessment is made, such powers can be exercised if the Commissioner is of the opinion that for the purpose of protecting the interest of Government revenue, it is necessary to do so. The power thus, is of drastic nature. Any such power, therefore, is coupled with the duty to exercise such power with due care and in appropriate cases. Subsection (2) of Section 45 when specifies the life of such order of provisional assessment for a maximum period of one year, it further amplifies that the same is in the nature of a drastic measure for a temporary period. The authority exercising such powers, therefore, must have a strong prima facie case to show that upon ultimate conclusion of the assessment, there is every likelihood of tax, interest and/or liability being attached on a dealer, and further that pending such consideration, it is necessary in the interest of Government revenue to pass order of provisional attachment. Such powers cannot be exercised in a routine manner in every case of reopening of assessment de hors the consideration noted above and in any case not merely because some assessment proceedings are pending. At that stage, it is merely a prima facie, exparte opinion of the assessing authority that a certain tax demand is likely to arise. This would be subject to biparte assessment proceedings. Even after the assessment is done, it is subject to further appeals, typically first before the Commissioner and thereafter before the VAT Tribunal and the High Court. At all such appellate stages there are powers for

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granting stay or waiving requirement of predeposit if statute so provides. Therefore, to contend that mere pendency of assessment or reassessment proceedings would clothe the authority to pass order of provisional attachment would be wrong. Pendency of such proceedings would be a prerequirement for exercising such powers. But the additional requirement would be that it is necessary to do so to protect the interest of revenue.

9. While, therefore, not accepting the contention of the counsel for the petitioner of total lack of power of the authority to pass order of provisional attachment, we must examine whether in the present case, such powers could have been exercised. We are conscious that such powers are in the discretionary nature, and as long as such discretion is exercised bona fide, and that sufficient material is available on record permitting exercise of such discretion, the Court would not ordinarily interfere in such orders. However, when the nature of power is drastic, the Court's scrutiny in the sufficiency of reasons would necessarily be more incisive.

13. The respondents have raised three fold objections, such objections are yet to be gone into. The petitioner's opposition to the points raised by the Department would require a detailed scrutiny and examination of materials not fully before us. In any case, we do not intend to bypass the assessment proceedings. Suffice it to say that at this stage to pass an order of provisional attachment would neither be permissible nor be proper. To reiterate, when the petitioner's classification on the basis of which the tax has so far been collected, cannot be stated to be without any basis nor can it be stated that the petitioner has no prima facie case, and when the assessment proceedings are yet to be completed, resorting to such extreme power of attachment without anything further to suggest that the liability if ultimately finalized, the petitioner will not pay, would simply not be permissible. It is not the case of the Department placed before us through any material on record that if ultimately any additional tax liability is finalized, the

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petitioner would not pay or be in a position to pay such taxes."

16. In the present case, nothing is demonstrated by the department either in the orders of attachment or in the affidavit filed before us. The reason why exercise of such drastic power of attachment of bank accounts was necessary. We would therefore set aside such attachments. At the same time, we would like to provide some security so that eventually, if the tax liability is confirmed, the department is not left with no means to recover the same.

17. In the result, petition is disposed of with following directions:

1. The respondents shall return the petitioners three cheques collected on 20.02.2018.

2. Second show-cause notice dated 19.03.2018 is set aside leaving it open for the department to consider only on the ground of lack of jurisdiction and not on merits of the demand sought to be raised in this show-cause notice. Resultantly, this would not prevent the department from considering legal ways of raising further demand for the same period covered under the show-cause notice dated 27.02.2018, if otherwise permissible in law.

3. The provisional attachment of the petitioner's two bank accounts is removed. This is, however, subject to following conditions:

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(i) The petitioners shall maintain at all time a stock worth minimum sum of Rs. 50 lacs till the final disposal of the adjudication proceedings arising out of show-cause notice 27.02.2018.

(ii) The petitioners shall file an undertaking to this effect before the Court latest by 25.04.2018.

4. Petitioners' all defences in response to the show-cause notice dated 27.02.2018 are obviously kept open.

(AKIL KURESHI, J)

(B.N. KARIA, J)

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