IN THE HIGH COURT OF KERALA AT ERNAKULAM

Present:

THE HONOURABLE MR. JUSTICE A.M.BADAR

Wednesday,the 24th day of March 2021/3rd Chaithra, 1943

WP(C) No.5063/2021(G)

PETITIONER

KERALA COMMUNICATORS CABLE LIMITED,142- H A, FIRST FLOOR, COA BHAVAN, THOUNDAYIL ROAD, PANAMPILLY NAGAR, ERNAKULAM - 682036., (REPRESENTED BY ITS MANAGING DIRECTOR, MR. SURESH KUMAR P. P.)

RESPONDENTS

1. THE ADDITIONAL DIRECTOR GENERAL,
DIRECTORATE GENERAL OF GOODS AND SERVICE TAX INTELLIGENCE,
KOCHI ZONAL UNIT, 1ST FLOOR, CENTRAL EXCISE BHAVAN,
KATHRIKKADAVU,
KOCHI - 682017.
2.UNION OF INDIA,(REPRESENTED BY SECRETARY, FINANCE DEPARTMENT, DELHI), DEPARTMENT OF REVENUE, MINISTRY OF FINANCE, GOVERNMENT OF INDIA, NORTH BLOCK, NEW DELHI - 110001.

Writ Petition (civil) praying inter alia that in the circumstances stated in the affidavit filed along with the WP(C) the High Court be pleased to direct the 1st Respondent to release the Exhibit P12 series bank guarantee and bond executed in pursuance of Exhibit P9 orders passed by the 1st respondent .

This petition coming on for admission upon perusing the petition and the affidavit filed in support of WP(C) and upon hearing the arguments of M/S M.P.SHAMEEM AHAMED, CYRIAC TOM, Advocates for the petitioner M/S SREELAL N. WARRIER, Standing Counsel for R1 and of ASSISTANT SOLICITOR GENERAL OF INDIA for R2(B/O), the court passed the following

A.M.BADAR, J.

WP(C) No.5063 of 2021

Dated this the 24th day of March 2021

O R D E R

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Heard both sides.

Admit. Learned Standing counsel takes notice for the 1st respondent. Learned Assistant Solicitor General takes notice for the 2nd respondent.

2.By this petition, the petitioner is challenging the orders of attachment of its bank accounts under Section 83 of the CGST Act. By way of interim relief, the petitioner is praying for directing the 1st respondent to release the bank guarantee furnished in pursuant to the order at Ext.P12(Series) and for discharge of the bond executed in pursuant to the order at Ext.P9.

3. Search and inspection under Section 67 of the CGST Act was conducted at the premises of the petitioner. It has resulted in provisional attachment of bank accounts of the petitioner vide orders at Exts.P6, P6A and P6B. The petitioner preferred objection to the provisional attachment by communication at Ext.P7. Simultaneously, by filing a writ petition bearing No.16533 of 2020, the petitioner had challenged the attachment of his bank accounts pursuant to the powers conferred by Section 83 of the CGST Act. During pendency of the said writ petition, by order dated 24.08.2020 (Ext.P9), the respondent had modified the provisional attachment of bank accounts by imposing the following conditions:-

> *"(a) Furnishing of security in the form of bank guarantee in the name of the President of India equivalent to the credit balance available as on the bank, closing hours on 20.08.2020, i.e, date of hearing, in the accounts sought to be restored. The bank guarantee should be valid for one year from date of issue. You should produce your account statement/certificate from the bank indicating the amount of credit balance as on 20.08.2020 in each account sought to be restored.*
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> *(b) Furnishing of a bond binding you to the President of India to pay any tax,*

interest, penalty or fine that may become payable consequent to issue of an order by the proper officer, failing which the bond and bank guarantee may be enforced to recover any pending dues."

4. The petitioner, feeling aggrieved by the modification effected by the order dated 24.08.2020 (Ext.P9) had tendered a protest letter (Ext.P11) on 27.08.2020 by stating that the petitioner is furnishing the bank guarantee and is executing a bond under protest reserving the right to challenge the same before this Court. Thereafter, the petitioner preferred a memo for withdrawal of the Writ petition on 05.10.2020 and that is how the writ petition came to be dismissed as withdrawn on 13.10.2020.

5. Learned counsel appearing for the petitioner submitted that imposing the condition of furnishing the bank guarantee under Section 83 of the CGST Act, 2017 is totally impermissible and illegal. The search was conducted under section 67 of the CGST Act and the next stage would be issuance of show cause notice under Section 73 or 74 of the said Act, which can be followed by the adjudication proceedings. It is further submitted that if the adjudication goes against the petitioner, then the petitioner can prefer an appeal under Section 107 of the Act and only 10% of the disputed amount can be pre-deposited for filing such appeal and the demand is deemed to be stayed by deposit of this 10% of the disputed amount. The maximum deposit for filing such statutory appeal is only Rs.25 Crores. With this, it is submitted that directing the petitioner to furnish the bank guarantee of about thirty crores of rupees which was the credit balance in his account would seriously affect his business and is contrary to the provisions prescribed for adjudicating the demand which can be made in pursuant to the search effected under Section 67 of the CGST Act.

6. It is further submitted by the learned counsel for the petitioner that the order at Ext.P9 directing furnishing of the bank guarantee as well as bond was not the subject matter of W.P.(C). No.16533 of 2020 and the protest letter at Ext.P11 was filed by the petitioner way back in August 2020, i.e, prior to withdrawal of the writ petition. Learned counsel for the petitioner

places reliance on the judgment of the Hon'ble Division Bench of the Gujarat High Court in the matter of **Valerius Industries V. Union of India** and that of the Hon'ble Bombay High Court in Writ Petition (ST) No.97165 of 2020 in **AJE India Private Limited V. Union of India and Ors.** decided on 22.10.2020 to substantiate his contention that there cannot be an order directing furnishing of the bank guarantee under Section 83 of the CGST Act.

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7. As against this, learned Standing counsel appearing for the respondent submits that orders at Exts.P6, P6A and P6B are in standard form and those are computer generated orders and provisional in nature subject to their finalisation on hearing objections raised, if any, to the same. Now the attachment order has been lifted with a direction to furnish bank guarantee and the petitioner can very well use the amount in the bank account which were earlier attached by the provisional attachment orders at Ext.P6. It is further submitted that challenge to the orders at Ext.P6(series) met with rejection at the hands of this Court and there is no procedural illegality in order at Ext.P9 modifying the provisional attachment. The petitioner can resort to the appellate remedy, if he is factually aggrieved by the modification of provisional attachment. In the wake of the withdrawal of the earlier writ petition, the petitioner cannot be heard to say that the modified orders are illegal.

8. I have considered the submission so advanced and also considered the judgments relied on by the parties.

9. The view expressed by the Hon'ble Division Bench of the Gujarat High Court in Special Civil Application No.19533 of 2019 in Kushal Ltd., V. Union of India has been kept in abeyance by the Hon'ble Supreme Court in the matter of **Union of India & Anr. V. Kushal Ltd & Anr** by an order dated 16.11.2020 passed in Special Leave to Appeal(C). No.10070 of 2020.

10. In the matter of **Valerius Industries** *(Supra),* the Hon'ble Division Bench of the Gujarat High court has dealt with this Court of powers under

Section 83 of the CGST Act and summary of its finding can be found in paragraph No.52, which reads thus:-

> *"[1] The order of provisional attachment before the assessment order is made, may be justified if the assessing authority or any other authority empowered in law is of the opinion that it is necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or far-fetching, which would warrant the formation of the behalf.*
> *[2] The power conferred upon the authority under section 83 of the Act for provisional attachment could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on the substantive weighty grounds and reasons.*
> *[3] The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution*
> *[4]The power under Section 83 of the Act for provisional attachment should be exercised only if there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his / her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.*
> *[5] The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.*
> *[6] The attachment of bank account and trading assets should be restored to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings."*

11. Similarly, the Hon'ble Bombay High Court in the matter of ***AJE India Private Limited*** *(supra)* had also considered the scope of the powers under section 83 of the CGST Act and held thus in paragraph Nos.25 and 27:-

> *"25. Merely because there is a proceeding under Section 67 would not mean that recourse to such a drastic power as under section 83 would be an automatic consequence, more so when petitioner has cooperated with the investigation. That apart, section 83 speaks of provisional attachment of any property including bank account. The record is silent as to whether any attempt has been made for provisional attachment of any property of the petitioner and instead why the bank accounts should be attached. Besides, by use of the word "may" in sub-section (1) of section 83 Parliament has made it quite clear that exercise of such a power is discretionary. When discretion is vested in an authority, such discretion has to be exercised in a just and judicious manner, more so when the power conferred under section 83 admittedly is a very drastic power having serious ramifications. Such power having the potential to adversely affect property rights of persons as well as life and liberty under Article 21 of the Constitution of India has to be exercised in a fair and reasonable manner*
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> *27. During the course of the hearing Mr. Sridharan had referred to*

averments made in the writ petition more particularly to Ground No.11 to submit that petitioner had already offered to respondent No.2 its land, building and plant and machinery having estimated gross value of approximately Rs.44 crores to secure the interest of the revenue. In such circumstances, we are of the view that recourse to section 83 by respondent No.2 straight away is not justified. Prima facie, such an exercise appears to be harsh and excessive thus arbitrary."

12. In the case in hand, search was conducted on 09.06.2020 and the further proceedings thereof are still pending. Claiming to be necessary in the interest of revenue, by orders at Exts.P6, P6A and P6B, bank accounts of the petitioner came to be attached and subsequently, on the basis of objection (Ext.P7), the provisional attachment order has been modified by the order at Ext.P9, the relevant portion of which is already quoted herein above. The petitioner is directed to furnish the security in the form of bank guarantee in the name of the Hon'ble President of India, equivalent to the credit balance available as on 20.08.2020 which according to the learned counsel for the petitioner, is about Rs.30 crores. Neither the order at Exts.P6(series) nor the order at Ext.P9 reflects anything which substantiate that interest of revenue requires this action to be taken in the matter. What is the reasonable apprehension with the authority is not disclosed in the order at Ext.P6(Series) or in the order at Ext.P9. Furnishing bank guarantee of about Rs.30 crores would certainly block that much amount from the business of the petitioner. The petitioner, on account of an order by the adjudicating authority has no remedy of appeal under Section 107 of the CGST Act in the matter. Therefore, in the light of ratio of judgments in the matter of **Valerius Industries** and **AJE India Private Limited**, I am of the considered opinion that the order directing furnishing of the bank guarantee needs to be stayed till disposal of the writ petition, by directing the petitioner to execute the undertaking that he will not sell, alienate or dealt with any of his assets as seen from the balance sheet produced by him at Ext.P16. Therefore the order:-

During the pendency of the petition, the impugned direction contained in Clause 2(a) of Ext.P9, requiring the petitioner to furnish security in the form of the bank guarantee is stayed and the petitioner is directed to furnish undertaking before this Court by way of an affidavit that it shall not alienate any of its fixed assets, plant, property and equipments shown in the balance sheet dated 31.03.2020 (Ext.P16) till disposal of the instant petition. Parties

to act on authenticated copy of this order.

sd/-
A.M.BADAR , JUDGE

ajt

/true copy/

Sd/-
ASSISTANT REGISTRAR

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EXHIBIT P6 - COPY OF THE FORM GST DRC-22 BEARING DIN 202007DSS500004BA5A8 DATED 15.07.2020.

EXHIBIT P6A - FORM GST 202007DSS500002CF8E3 DATED 15.07.2020.

EXHIBIT P6B - FORM GST 202007DSS500002X65F7 DATED 15.07.2020.

EXHIBIT P7 - COPY OF THE OBJECTIONS DATED 22.07.2020 FILED UNDER RULE 159(5) AGAINST THE PROVISIONAL ATTACHMENT OF 2 ACCOUNTS MAINTAINED IN FEDERAL BANK.

EXHIBIT P9 - COPY OF THE LETTER DATED 24.08.2020 ISSUED BY THE 1ST RESPONDENT IMPOSING CONDITIONS FOR RESTORATION OF BANK ACCOUNT.

EXHIBIT P11 - COPY OF THE PROTEST LETTER DATED 27.08.2020.

EXHIBIT P12 - COPY OF THE BANK GUARANTEE DATED 26.08.2020 GIVEN BY STATE BANK OF INDIA FOR INR 23,32,80,459.

EXHIBIT P12A - COPY OF THE BANK GUARANTEE DATED 27.08.2020 GIVEN BY FEDERAL BANK LIMITED FOR INR 7,21,30,857.65

EXHIBIT P12B - COPY OF THE BOND EXECUTED BY THE PETITIONER.

EXHIBIT P16 - COPY OF THE AUDITED BALANCE SHEET AND PROFIT AND LOSS ACCOUNT FOR THE YEAR 2019-20.