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**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISIDICIION**

WRIT PETITION NO. 5473 OF 2021

M/s. Monopoly Innovations Pvt. Ltd. .. Petitioner

Versus

Union of India & Ors. .. Respondents

Mr. Bharat Raichandani a/w Mr. Rishabh Jain i/by UBR Legal
Advocates for petitioner.

Mr. J. B. Mishra a/w Lilesh P. Sawant for respondents.

**CORAM: DIPANKAR DATTA, CJ &
M. S. KARNIK, J.**

**HEARD ON: SEPTEMBER 14, 2021
JUDGMENT ON: SEPTEMBER 24, 2021**

JUDGMENT [Per DIPANKAR DATTA, CJ.]:

1. The petitioner is a private limited company duly registered under the provisions of the Companies Act, 1956. It is a registered unit under the Micro, Small and Medium Enterprise Development Act, 2006 and, *inter alia*, engaged in the business of production of chemicals and allied products. It is also registered with the Goods and Services Tax Department.
2. The details of the range of products in which the petitioner deals and which falls under various GST rate slabs is detailed in paragraph 4.2 of the writ petition. According to the petitioner, it has paid GST, as applicable, and filed returns, as and when

required under section 39 of the Central Goods and Services Tax Act, 2017 (hereinafter "the CGST Act", for short).

3. The writ petition, in its original form, laid a challenge to letters dated February 10, 2021 and March 15, 2021, both issued by the Deputy Commissioner (Anti Evasion) CGST, St & CEx, Raigad Commissionerate.

4. By the letter dated February 10, 2021, it was alleged that the petitioner had classified the chemical products referred to therein under CTH 15162099 and tax liability discharged is @ 5%; however, on verification, it was noticed that the said chemical products are no longer to be classified under Chapter 15162099 and should have been classified under CTH 2916, attracting GST @ 18%. On the ground that there has been misclassification of the goods, the petitioner was conveyed of its liability to pay differential duty estimated at Rs.18,30,87,423/-. Direction followed for payment of the differential duty at the earliest.

5. The subsequent letter dated March 15, 2021 is in the nature of a reminder calling upon the petitioner to pay the differential duty of Rs.18,30,87,423/- immediately.

6. Upon hearing the writ petition at the admission stage, a coordinate Bench of this Court by its order dated March 30, 2021 issued notice to the respondents, returnable in four weeks. During the pendency of the writ petition, two separate orders dated April 27, 2021 were passed by the Commissioner, CGST & Central Excise, Raigad Commissionerate, seeking to

provisionally attach the property of the petitioner under section 83 of the CGST Act. The petitioner's bankers, HDFC Bank and ICICI Bank, were directed not to allow debit to be made from the accounts maintained with such banks or any other account operated by the petitioner without prior permission of the department.

7. When the writ petition was listed on May 6, 2021, counsel appearing for the petitioner submitted that objection to the orders provisionally attaching the bank accounts would be filed before the Commissioner under Rule 159 (5) of the CGST Rules. Accordingly, it was observed by the Bench that the Commissioner may take a decision thereon within a period of two weeks from the date of submission of objection. Hearing was, accordingly, adjourned till June 29, 2021.

8. Availing the leave granted by the Bench, the petitioner objected to the orders of provisional attachment by its representations dated May 7 and 17, 2021 and sought for revocation thereof on diverse grounds indicated therein. After hearing the authorized representative of the petitioner, the Commissioner has passed an order dated May 21, 2021 whereby the objection raised to the orders of provisional attachment has been overruled and the prayer for revoking the said orders rejected. It is such order of May 21, 2021 that has been challenged by the petitioner by amending its writ petition pursuant to leave granted on June 8, 2021.

9. We have heard Mr. Raichandani, learned advocate for the petitioner and Mr. Mishra, learned advocate for the respondents at some length.

10. Based on our appreciation of the arguments advanced by Mr. Raichandani and Mr. Mishra and on perusal of the order impugned dated May 21, 2021, we are of the opinion that the prayer of the petitioner for revoking the orders of provisional attachment ought to be considered *de novo* by the Commissioner. This is for the reason that although the Commissioner has written a detailed order spread over 9 (nine) pages as to why the provisional attachment ought to continue, it suffers from the infirmity of lack of application of mind as well as breach of principles of natural justice. We propose to elaborate hereafter why we perceive the order to suffer from such infirmity.

11. Paragraph 3 of the order records that the petitioner's authorized representative, in course of a meeting with the Commissioner, had promised to pay the differential duty but on the contrary, without effecting payment, opted to approach this Court by instituting this writ petition only with the intention of delaying the deposit. This assertion has been categorically denied by Mr. Raichandani. In the absence of any evidence of what transpired in the meeting, we do not consider reference to the fact of the petitioner agreeing to deposit the differential duty to be of any relevance for the purpose of considering the prayer for lifting of the orders of provisional attachment.

12. The discussion and findings start from paragraph 7 onwards of the impugned order.

13. The case of the respondents essentially is that the petitioner has made a misclassification of the chemical products referred to therein, viz. i). Methyl Palmitate; ii). Methyl Ester of Soya Oil; and iii). Methyl Lenolanate (hereafter "the said chemical products", for short) by not classifying the same under Chapter 2915/2916 attracting GST @ 18%. Although the Commissioner has indicated in paragraph 2 of the order that the petitioner's authorized representative was briefed about the reasons as to why the said chemical products should be classified under Chapter 2915/2916 instead of 1516, we have not noticed any discussion in this regard in the impugned order. Reiteration that the petitioner's representative was briefed about the reasons is found in paragraph 7(vi) of the order too; however, again, there are no reasons assigned in support of the version of the Commissioner.

14. The order of the Commissioner records that pursuant to initiation of investigation under section 67 read with section 74 of the CGST Act, provisional attachment of the petitioner's bank accounts has been made only with the intention to protect the large amount of revenue sought to be evaded by the petitioner on account of "**willful misclassification of goods**" (emphasis supplied). At paragraph 7(ii), the Commissioner recorded that in course of investigation, it has been observed that there was no business activity on behalf of the petitioner since November, 2020. However, this assertion is also disputed by Mr.

Raichandani by referring to paragraph G.1 at page 13e of the writ petition. According to him, not only the officials of the respondents while visiting the petitioner's factory premises on January 23, 2021 found the same to be operational, but the petitioner has also filed monthly GST returns for the period November 1, 2020 to March 31, 2021 showing the turn over of approximately Rs.35.50 Cr. and has also paid Rs.1.84 Cr. of GST during the said period; however, despite such information being readily available to the respondents on their electronic system, the Commissioner chose to ignore the same. In course of arguments, Mr. Mishra did not seriously dispute this assertion of Mr. Raichandani but asserted, relying on the Commissioner's order and the reply affidavit, that whatever the Commissioner has observed in the order is correct. Whether or not there has been any business activity or not is a question of fact. However, if indeed, GST returns for the period November 1, 2020 to March 31, 2021 GST have been filed by the petitioner, the same is a matter of record. It was the duty of the Commissioner to record a finding on the aforesaid factual aspect upon looking into the relevant records. This exercise does not appear to have been undertaken. That apart, the Commissioner ought also to have dealt with the contention of the petitioner that the petitioner's factory premises were found to be functional on January 23, 2021.

15. At paragraph 7(iii), the Commissioner referred to non-cooperation on the part of the petitioner to take the investigation to a logical conclusion. Taking serious exception to such allegation, Mr. Raichandani has submitted that the

investigation was initiated on January 23, 2021 and it is incomprehensible as to why, despite recording of statements on January 25 & 28 and February 12, 2021, the investigation has not been concluded. It is further contended by him that as per request of the relevant department, samples of all the products were submitted together with relevant documents for the disputed period which would amply demonstrate complete cooperation on the part of the petitioner. The impugned order dated May 21, 2021 concluding that the petitioner has not cooperated with the department has been criticized as totally incorrect. Insofar as the statement in the said paragraph that the petitioner was shown several evidences such as confirmation of product description by the laboratory, the contention is that not a single evidence or data, as claimed, was shown to the petitioner. On the contrary, it is asserted that by referring to authorities, the petitioner sought to persuade the Commissioner to hold in its favour, which unfortunately was ignored. The positive statements made in paragraph G.2 of the writ petition have been evasively denied by the respondents in paragraph 30 of their affidavit-in-reply. We reiterate that the evidence referred to in paragraph 7(iii) of the impugned order has not been annexed to the reply affidavit and, therefore, it is difficult to accept the version as recorded in such paragraph. Even otherwise, if at all it is a fact that the petitioner has not cooperated with the investigation, that by itself would not preclude the respondents from completing it with promptitude in accordance with law. However, this cannot constitute a valid reason for continuing the orders of provisional attachment.

16. The next reason assigned in paragraph 7(iv) is that local manufacturers engaged in the production of similar chemical products that the petitioner produces have been classified under CTH 29, attracting IGST and GST @ 18% each, for the different products. Mr. Raichandani has raised a valid point. It is contended that if other local manufacturers erroneously classify their products under a particular Chapter, there is no law that binds the petitioner by such erroneous classification. Whether the local manufacturers, referred to in paragraph 7(iv), have been classifying their products in a particular manner could not have been relevant and material for the purpose of deciding whether the petitioner has misclassified the said chemical products. It was necessary for the Commissioner to show, by reference to relevant evidence and provisions of law, what the petitioner was required to do for the purpose of classification of the said chemical products and that the petitioner had not so classified leading to loss of revenue. This would not only have provided support to the conclusions reached, but would also have provided us with the opportunity to hold that the Commissioner was on the right track. The Commissioner was not required to cite instances of other local manufacturers to insist that the petitioner ought to follow suit. This, in our opinion, is a glaring mistake in the decision-making process.

17. In course of hearing, we had made it sufficiently clear to Mr. Mishra that in certain portions of the impugned order, the Commissioner had recorded conclusions without supporting

reasons. Attachment of a property being in the nature of exercise of a drastic power, the Commissioner was required to be more circumspect in recording his conclusions by reference to the applicable law rather than recording his *ipse dixit*. To support the impugned order, Mr. Mishra sought to draw our attention to the affidavit-in-reply. According to him, sufficient reasons have been assigned in such affidavit which the Court ought to consider. We are afraid, the attempt of the respondents to introduce fresh reasons in their affidavit-in-reply is not a permissible course of action to test the validity of the impugned order, having regard to the law laid down by the Supreme Court in its decisions reported in AIR 1952 SC 16 **[Commissioner of Police, Bombay vs. Gordhandas Bhanji]** and AIR 1978 SC 851 **[Mohinder Singh Gill & Anr. Vs. The Chief Election Commissioner, New Delhi & Ors.]**. Law has been laid down therein with sufficient clarity that the validity of an order passed by an authority has to be judged on the basis of the reasons assigned therein, and reasons cannot be supplemented by an affidavit or otherwise when such order is challenged in a Court. We are, therefore, not in a position to sustain the findings of the Commissioner by looking at the reasons given in the affidavit-in-reply.

18. Paragraph 7(v) of the impugned order records the conclusion of the Commissioner that power under section 83 of the CGST Act has been correctly invoked. Since proceedings are pending and we do not propose to interdict exercise of

power under section 83 at this stage, no further discussion on paragraph 7(v) is considered necessary.

19. We have referred to the contents of paragraph 7(vi) of the impugned order at an earlier part of this judgment. In view thereof, any further dilation is not required.

20. At paragraph 7(vii) of the impugned order, the Commissioner upon consideration of the opinion of the Institute of Chemical Technology, Mumbai (hereafter "the Institute", for short), rejected the same by observing that he did not "*find the report to be proper*". The comments made for rejecting the report would tend to suggest that the Commissioner has good deal of knowledge in the subject of chemical science. However, we do not claim to be experts in the said subject and, therefore, it is beyond our competence to say which of the two versions (that of the Institute and the Commissioner) is correct. At the same time, we are also not aware of the educational qualifications of the Commissioner or his expertise in chemical science. In any event, how far the report of the Institute was worth consideration should have been examined by the Commissioner by obtaining a counter expert opinion and based thereon he could have proceeded to reject the Institute's report instead of discrediting the same. The observations made by the Commissioner are not structured on any referable scientific basis and, therefore, it is all the more necessary that the prayer of the petitioner for lifting of the orders of provisional attachment deserves *de novo* consideration.

21. Paragraph 8 of the impugned order, in the light of the arguments advanced on behalf of the respondents, makes interesting reading. At the stage of deciding whether the orders of provisional attachment should be lifted or not, the Commissioner appears to have reached a final conclusion that *"the investigations conducted so far unambiguously indicate that these goods namelyappears to be classifiable under chapter sub-heading 29161590 attracting GST @ 18% and the differential GST liability for the period July 2017 to March 2021 is Rs.18.32 Crores"*.

22. We may, at this stage, record the contradictory stand taken by Mr. Mishra. While defending the action of the Commissioner in not assigning reasons for the finding arrived at by him that there has been misclassification, Mr. Mishra was heard to submit that at the stage of disposing of an objection under Rule 159(5) of the CGST Rules, it is not open for the Commissioner to express any conclusive opinion. However, such a stand taken by Mr. Mishra stands completely demolished in view of the Commissioner's own unambiguous conclusion on the basis of investigations conducted that the petitioner is liable to bear the differential duty of Rs.18.32 Cr., at this stage, when investigations are still to be concluded. Obviously, the respondents have been blowing hot and cold at the same time, which is not permissible.

23. Be that as it may, based on the aforesaid findings as in paragraphs 7 and 8 of his order, the Commissioner in paragraph 9 recorded a satisfaction that the present case was a fit case

for invocation of section 83 of the CGST Act. It was found that as per the balance-sheet for the year 2019-20, the petitioner had declared the value of tangible assets or fixed assets as Rs.8.53 Cr. approximately. Since the dues were far more than the value of the immoveable property, it was decided to continue attachment of the bank accounts. Mr. Raichandani has contended that the orders of provisional attachment ought to have been lifted bearing in mind the value of the assets and also in view of the law that pre-deposit of 10% is required if an appeal were preferred against the final order. We do not think that at this stage this issue ought to be considered, in view of the order proposed.

24. The grounds on which the judicial review is available are well established. Non-consideration of relevant materials and consideration of extraneous matters together with non-access of the part affected to materials relied on in reaching conclusions, if substantiated, would provide sufficient ground for judicial review. In the present case, we find that the provisional order dated May 21, 2021 is unsustainable for the reasons discussed above.

25. Accordingly, the impugned order dated May 21, 2021 stands set aside. The Commissioner is directed to *de novo* consider the objection of the petitioner dated May 7 & 17, 2021 in accordance with law and in the light of the observations made above, as early as possible but not later than three weeks of receipt of copy of this order.

26. In the event, the Commissioner refuses to lift the orders of provisional attachment once again, appropriate reasons shall be assigned. Such order may be communicated without undue delay. Should the Commissioner be persuaded to hold in favour of the petitioner, it is needless to observe that follow-up steps shall be taken at the earliest to lift the orders of provisional attachment on such terms as the Commissioner may deem fit and proper.

27. The writ petition stands allowed to the extent as aforesaid. No costs.

(M. S. KARNIK, J.)

(CHIEF JUSTICE)

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