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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Decision delivered on: 12.05.2021

+ **W.P.(C) 2348/2021 & CM No. 6860/2021**

ROSHNI SANA JAISWAL

..... Petitioner

Through: Mr. Harsh Sethi, Advocate

versus

COMMISSIONER OF CENTRAL TAXES , GST DELHI (EAST)

..... Respondent

Through: Mr. Harpreet Singh, Senior Standing Counsel.

CORAM:

HON'BLE MR. JUSTICE RAJIV SHAKDHER

HON'BLE MR. JUSTICE TALWANT SINGH

[Court hearing convened *via* video-conferencing on account of COVID-19]

RAJIV SHAKDHER, J. (ORAL):

Preface: -

1. This writ petition is directed against the orders of even date, i.e., 07.12.2020 passed by the respondent, whereby several bank accounts of the petitioner have been provisionally attached.

1.1 The details of these bank accounts, which have been provisionally attached by the respondent, are set forth hereafter.

S. No.	Name of the bank	Account No.
1.	HDFC Bank Ltd.	50100122220961
2.	Standard Chartered Bank	45610028287
3.	Union Bank of India	344902010001127
4.	Standard Chartered Bank	24110205602

Background facts: -

2. The challenge, to the aforementioned orders, arises in the background of the following undisputed facts and circumstances.

2.1. The petitioner was acting as a director on the Board of Directors of a company, going by the name of Milkfood Ltd., between 2006 and 2008. The petitioner is also a shareholder in the said company, and owns approximately 14.33 % equity shares. The petitioner drew a salary of Rs.1.50 crores per annum *qua* the financial year (in short ‘FY’) 2019-2020.

2.2. The respondent, based on the information received, that Milkfood Ltd. was availing Input Tax Credit (in short ‘ITC’) against fake/ineligible invoices, commenced investigation, under Section 67 of the Central Goods and Services Tax Act, 2017 (in short ‘the Act’), against Milkfood Ltd.

2.3. The respondent claims that, the statement of the persons, who controlled entities, which enabled Milkfood Ltd. to claim ITC, were recorded in the course of the investigation. It is in this connection, the respondent claims, that “the voluntary statement” of the petitioner was recorded on 03.12.2020.

2.4. The petitioner, as per the respondent, in her statement made to the concerned officer, *inter alia*, admitted to the fact that she had acted as a director of the company, i.e., Milkfood Ltd., between 2006 and 2008, and since then, she has been working in the company in the capacity of a mentor/advisor.

2.5. Furthermore, the petitioner is also said to have stated that, it is in her capacity as the mentor/advisor to Milkfood Ltd., that she received Rs.1.50 crores in the concerned FY i.e. 2019-2020, from Milkfood Ltd. According to the petitioner, this money was given as she had been providing “strategic guidance” to Milkfood Ltd.

2.6. The petitioner, as noticed above, had accepted the fact that, she held

an equity stake of 14.33% in Milkfood Ltd.

2.7. Since the petitioner was aggrieved *qua* the impugned action of the respondent, she approached this Court by way of the instant writ petition. Upon notice being issued, the respondent has filed its counter-affidavit.

Submissions on behalf of the respondent: -

3. Mr. Harpreet Singh, who appears on behalf of the respondent, has made the following submissions: .

(i) The petitioner has availed of the alternate remedy available to it under Rule 159(5) of the Central Goods and Services Tax Rules, 2017 (in short ‘the Rules’), by filing objections under the said Rule, albeit during the pendency of the writ petition. Mr. Singh says that since objections, were filed during the pendency of the writ petition and after the counter-affidavit was filed on behalf respondent, there is no reference to this aspect of the matter, in the counter-affidavit. Mr. Singh states that the objections were disposed of *vide* order dated 19.04.2021.

(ii) Investigations, commenced under Section 67 of the Act, against the Milkfood Ltd., were still on.

(iii) Milkfood Limited has availed ITC credit. to the extent of approximately Rs.85 crores, based on fake invoices. The respondent had arrested persons, who controlled the entities which furnished fake invoices to Milkfood Ltd. Coercive proceedings were also intended to be triggered against the directors/employees of Milkfood Ltd.

(iv) The persons, connected to the suppliers and the directors/employees of Milkfood Ltd., had approached the concerned courts for grant of bail. In those proceedings, Rs.10 crores was deposited with the respondent, as the condition of bail. In addition, thereto, Rs.6 crores was voluntarily deposited by Milkfood Ltd. with the respondent. In all, out of an approximate amount

of Rs.85 crores, Rs.16 crores stands deposited with the respondent.

(v) The judgment of the Supreme Court, relied upon by petitioner, rendered in *M/s Radha Krishan Industries vs. State of Himachal Pradesh & Ors.*, 2021 SCC OnLine SC 334 [in short “*Radha Krishan Industries Case*”], has no applicability to the instant case, as, in that case, an adjudication order had already been passed.

Submissions on behalf of the petitioner: -

4. On the other hand, Mr. Harsh Sethi, who appears on behalf of the petitioner, submitted that. the proceeding initiated against the petitioner. under Section 83 of the Act. is without jurisdiction, as the petitioner does not fall within the ambit of the definition of a ‘taxable person’; the taxable person being Milkfood Ltd and not the petitioner. Therefore, the impugned orders cannot be sustained, as this crucial jurisdictional ingredient is missing.

4.1. Mr. Sethi says that the other ingredients, provided in Section 83 of the Act, are also missing. The respondent, before triggering the provisions of Section 83 of the Act, had to satisfy itself that there was a “pending” proceeding under the provisions of Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74 of the Act. Furthermore, Mr. Sethi says that, the respondent was also required to form an opinion, before taking recourse to Section 83 of the Act, that attachment of the petitioner’s bank account was necessary for the purpose of protecting the interest of the revenue.

4.2. Mr. Sethi says that the principles enunciated in *Radha Krishan Industries Case*, squarely apply to the instant case. In this context, Mr. Sethi relies, in particular, on paragraphs 41 and 72(iv) & (v) of the judgement rendered in *Radha Krishan Industries Case*.

Analysis and Reasons: -

5. We have heard the learned counsel for the parties and perused the record.

5.1. According to us, the submission advanced by Mr. Singh, that the instant petition, under Article 226 of the Constitution, should not be entertained as recourse to an alternate remedy was taken by the petitioner, does not impress us, since the exercise of power under Section 83 of the Act, to begin with, was without jurisdiction. The fact that an alternate remedy is available to a litigant is a self-imposed limitation on the Court; something which did not deter the Court, when notice was issued in the matter, in the first instance, perhaps, given the assertions made in the petition. The Court can, and should exercise its powers, under Article 226 of the Constitution, amongst others, in cases where the impugned action or order concerned is without jurisdiction¹. In this case, one of the jurisdictional ingredients, which is missing, is that the petitioner is not a taxable person. This aspect is borne out upon perusal of the impugned orders, which are identical. In the impugned orders, dated 07.12.2020, the respondent adverts to the fact that, Milkfood Ltd. is the taxable person. For the sake of convenience, the relevant portion of one of the impugned orders, appended on page 32 (which concerns the provisional attachment of bank account of the petitioner maintained with HDFC bank), is extracted hereunder:

¹ See: *Calcutta Discount Co. Ltd. vs. ITO*, AIR 1961 SC 372: (1961) 41 ITR 191.

“28. In the present case the Company contends that the conditions precedent for the assumption of jurisdiction under Section 34 were not satisfied and come to the court at the earliest opportunity. There is nothing in its conduct which would justify the refusal of proper relief under Article 226. When the Constitution confers on the High Courts the power to give relief it becomes the duty of the courts to give such relief in fit cases and the courts would be failing to perform their duty if relief is refused without adequate reasons. In the present case we can find no reason for which relief should be refused.”

“It is to inform that M/s Milkfood Limited, having principal place of business at Bhandari House, 5th Floor, 91, Nehru Place, Delhi-110019 bearing registration number as GSTIN 07AAACM5913B1ZY and PAN AAACM5913B, is a registered taxable person under the CGST Act, 2017.....”

5.2. As indicated above, we are told that the order rejecting the petitioner’s objections under Rule 159(5) was passed on 19.04.2021. This order has not been placed on record. We are also not told of the date on which the objections were filed. On being queried, Mr. Singh concedes that the order, passed under the aforesaid Rule, on 19.04.2021, is not appealable.

5.3. Subsection 1 of Section 83 of the Act² in no uncertain terms states that provisional attachment can be ordered only *qua* property, including bank account, belonging to the taxable person. Furthermore, the definition of the ‘taxable person’, as set out in Section 2(107) of the Act³, provides that only that person can be a taxable person, who is registered or liable to be registered as per the Act. It is not even the case of the respondent that the petitioner is either registered or was liable to be registered. In terms of the provisions of Section 2(107) of the Act. Therefore, according to us, the proceedings must fail on this score alone.

5.4. As far as the other submissions are concerned, as to whether or not it could be said that the proceedings under Section 67 of the Act are pending, the same, in our view, need not detain us, for the reasons stated above.

5.5. We must, however, indicate that this aspect apart, the respondent has

² 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.

³ 2. In this Act, unless the context otherwise requires,—

(107) “taxable person” means a person who is registered or liable to be registered under section 22 or section 24;

not been able to place before us, any material, which would show that. the concerned officer, before triggering the provisions of Section 83 of the Act, had applied his mind to the other important aspect, which is, that the provision had to be taken recourse to, to protect the interest of the revenue.

5.6. In the counter-affidavit, the only aspect that the respondent has pointed out *qua* the petitioner is the “voluntary” statement made by her on 03.12.2020. We have alluded to what the petitioner has said in her statement, which is, in turn, gleaned from the counter-affidavit filed by the respondent. In our opinion, there is nothing in the statement of the petitioner, which would show, that she had anything to do with the purported illegal transaction said to have been carried out between Milkfood Ltd. [i.e., the taxable person], and its suppliers.

5.7. The petitioner claimed, in her voluntary statement, that she was paid Rs.1.50 crores in the FY 2019-2020 for rendering services in her capacity as a mentor/advisor to Milkfood Ltd. Therefore, even if we assume, for the moment, that, since investigations are on against the taxable person, and therefore, proceedings are pending under Section 67 of the Act, there is nothing placed on record to show that there was material available with the respondent, linking the petitioner to purported fake invoices. In other words, in the absence of such material, the impugned action concerning provisional attachment of the petitioner’s bank accounts, which is otherwise a “draconian” step, was unsustainable. In the zeal to protect the interest of the revenue, the respondent cannot attach any and every property, including bank accounts of persons, other than the taxable person.

Conclusion: -

6. Accordingly, for the forgoing reasons, we are inclined to allow the writ petition. It is ordered accordingly. The impugned provisional

attachment orders dated 07.12.2020. are quashed. The respondent will communicate the order passed today to the concerned Banks.

6.1. Consequently, the order dated 19.04.2021, disposing of the objections filed by the petitioner, would also collapse, in its entirety, as the proceedings carried out against the petitioner were without jurisdiction.

7. All concerned shall act on a digitally signed copy of the judgement passed today.

8. Pending application shall stand closed.

RAJIV SHAKDHER, J

TALWANT SINGH, J

MAY 12, 2021

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Click here to check corrigendum, if any