IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K.VINOD CHANDRAN

&

THE HONOURABLE MR. JUSTICE T.R.RAVI

FRIDAY, THE 14TH DAY OF AUGUST 2020 / 23RD SRAVANA, 1942

W.A.No.943 OF 2020

AGAINST THE JUDGMENT IN WP(C) 12710/2020(K) DATED 26.06.2020
OF HIGH COURT OF KERALA

APPELLANTS/ PETITIONERS:

1 SURESH KUMAR P.P., AGED 44 YEARS,
S/O.P.S.PARAMESWARAN,
MANAGING DIRECTOR, KERALA COMMUNICATIONS CABLE LTD.,
ADMIN OFFICE AT: 1ST FLOOR, 142-H 1A, COA BHAVAN,
THOUNDIYAL ROAD, PANAMPILLY NAGAR,
KOCHI, KERALA-682 036,
FORMERLY AT: CC 28/491, GIRI NAGAR,
KADAVANTHARA, KOCHI, KERALA-682 020.

2 MR.ABOOBACKER SIDHIQUE, AGED 59 YEARS,
S/O.CHERIYA HAMZA,
DIRECTOR, KERALA COMMUNICATIONS CABLE LTD.,
ADMIN OFFICE AT: 1ST FLOOR, 142-H 1A, COA BHAVAN,
THOUNDIYAL ROAD, PANAMPILLY NAGAR,
KOCHI, KERALA-682 036,
FORMERLY AT: CC 28/491, GIRI NAGAR,
KADAVANTHARA, KOCHI, KERALA-682 020.

BY ADVS.
SRI.MATHAI M PAIKADAY(SR.)
SRI.SANDEEP GOPALAKRISHNAN
SMT.JINNU SARA GEORGE
SHRI.ZAFAR ANTONIO

RESPONDENTS/ RESPONDENTS:

1 THE DEPUTY DIRECTOR,
DIRECTORATE GENERAL OF GST INTELLIGENCE (DGGI),
THIRUVANANTHAPURAM ZONAL UNIT,
SREEDHARNYA BOULEVARD, TC NO.2/3603,
OPPOSITE BIG BAZAR, KESAVADASAPURAM, PATTOM P.O.,
THIRUVANANTHAPURAM, KERALA-695 004,
E MAIL ID - DGGSTI.TRU@GOV.IN

2 THE SUPERINTENDENT,
ERNAKULAM RANGE-3, CENTRAL EXCISE BHAVAN,
KATHIKKADAVU, KOCHI, KERALA-682 017,
E MAIL ID - EGST.TIO403@GOV.IN

3 THE ASSISTANT COMMISSIONER,
CENTRAL TAX AND CENTRAL EXCISE (AUDIT) CIRCLE-IV,
CENTRAL EXCISE BHAVAN, KATHIKKADAVU,
KOCHI, KERALA-682 017,
EMAIL ID- CGSTAUDIT43@GMAIL.COM

4 THE SENIOR INTELLIGENCE OFFICER,
DIRECTORATE GENERAL OF GOODS AND SERVICES TAX
INTELLIGENCE, THIRUVANANTHAPURAM REGIONAL UNIT,
SREEDHARNYA BOULEVARD, TC NO.14/3603,
OPPOSITE BIG BAZAR, KESAVADASAPURAM, PATTOM P.O.,
THIRUVANANTHAPURAM, KERALA-695 004.
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5 MR.RENN ABRAHAM,
ASSISTANT COMMISSIONER-GST,
BUILDING NO.41/3945 ABC, CLAS TOWER, KARGIL LANE,
OLD RAILWAY STATION ROAD,
NEAR JC (LAW), KOCHI, KERALA-682 018,
EMAIL ID-EKMACISPLCIRI@KERALATAXES.GOV.IN

R1 TO R4 BY STANDING COUNSEL SREELAL N. WARRIER.
R5 BY SENIOR GOVERNMENT PLEADER SRI.MOHAMMED RAFIQ.

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
11-08-2020, THE COURT ON 14-08-2020 DELIVERED THE FOLLOWING:

"C.R"

K.Vinod Chandran & T.R.Ravi, JJ.

W.A.No.943 of 2020

Dated, this the 14th day of August, 2020

JUDGMENT

Vinod Chandran, J.

The petitioners, the Managing Director and Director of a Company registered under the Companies Act,engaged in providing Cable Services as a Multi Service Operator (MSO) under the Telephone Regulatory of India (TRAI) Regulations, are in appeal. The appellants allege that illegal proceedings were taken against them, purportedly under the Central Goods and Services Tax Act, 2017 ['CGST

Act' for brevity], and their residences and offices were raided, both of them kept under illegal custody and an amount of Rupees One Crore extorted from them. On the intervention of their Advocate at mid-night, they were released, allege the appellants. The appellants, in the writ petition prayed for

(i) setting aside Exhibit P2 notice, requiring them to provide information issued by the Senior Intelligence Officer (SIO), (ii) invalidation of search and seizure proceedings initiated under Section 67 of the CGST Act evidenced by Exhibit P4, (iii) refund of Rupees One Crore collected by the 4th and 5th respondents, (iv) a declaration that the petitioners are not liable to pay GST on the revenue share retained by the Local Cable Operator ['LCO' for brevity] as also (v) compensation for the damage to the reputation of the petitioners and the mental agony suffered.

2. The learned Single Judge found that the writ petition is premature and there was no evidence produced by the petitioners to substantiate the contention of harassment perpetrated on them. The learned Single Judge held that it is inappropriate to form an opinion regarding the allegations raised, at this stage, especially for reason of there being no supporting material to establish the allegations. The learned Single Judge refused exercise of discretion under Article 226 and the reliefs sought for were declined. The petitioners are in appeal against the findings and also produce further documents issued in the course of the investigation attaching their Bank accounts. These orders of attachment were produced for the first time in appeal, because the attachment was effected after the disposal of the writ petition.

3. We have heard Sri.Mathai M.Paikeday, learned Senior Counsel, through video-conferencing, instructed by Advocate Sri.Sandeep Gopalakrishnan, Sreelal N Warrier, learned Standing Counsel for the Department and its officers, as also Sri.Mohammed Rafiq, learned Counsel appearing for the State GST Department.

4. Learned Senior Counsel Sri.Mathai M.Paikeday argued that the entire proceedings are illegal and that there is untold misery caused to the appellants by reason of the high handed action of the respondent-officers who acted beyond the scope of their authority. It is pointed out that under Section 65 there was an audit initiated, as is evidenced from Exhibit P5 dated 15.05.2020, pending which investigation was initiated under Section 67 without any reasonable cause. Surprise raid was conducted at the offices and residences of the appellants, which commenced in the early morning and ended only at Midnight. The appellants were taken into illegal custody and not provided even basic amenities during the entire period. The appellants were also coerced into parting with Rupees One Crore, which is evidenced by Exhibit P3. Exhibit P3 is made not voluntarily and was executed under duress. Exhibit P4 order of seizure is without jurisdiction for reason of the SIO, having entered into a satisfaction or rather arrived at reasons to believe that the documents annexed therein were required to be seized. Section 67 specifically mandates such reasons to believe to be entered into by an officer not below the rank of a Joint Commissioner, which the SIO is not. The summons issued against the appellants, as is seen at Annexures A2 and A3 prior to the inspection, does not have the Document Identification Number ['DIN' for brevity], which is an imperative requirement as per Annexure A6 issued by the Central Board of Indirect Taxes and Customs [hereinafter referred to as "Central Board"]. There is also no substantiation as to a DIN having been

generated subsequently, within 15 days, as has been provided under para 5 of Annexure A6. It is hence contended that Section 67 proceedings initiated is invalid on the face of it and, hence, the attachment of the Bank accounts, as evidenced from Annexures A7 and A8 series of documents, are also to be set aside. There could also be no parallel proceedings of audit and investigation. The audit initiated has to be concluded before an investigation is initiated, asserts learned Senior Counsel.

5. It is argued that the cheque of Rupees One Crore was forcefully taken and the same is in violation of the prescription in the CGST Rules, 2017 as to the payments to be made to the Department. Rule 87 is pointed out, specifically to contend that an Electronic Cash Ledger has to be maintained in the prescribed form for each person liable to pay any amounts under the Act, in the common portal. Any deposit made, can only be with the prescribed form under sub-rule (2) of Rule 87 and not otherwise. No such prescribed form was generated, which establishes the duress under which the cheque was issued. The contention of the Department that the appellants had sought to get the benefits under Section 74(5) of the Act is, hence, prima facie incorrect. It is also pointed out that Exhibit P3 specifically indicated the protest under which the cheque was executed, which points to the threats under which such execution and handing over was made. It is vehemently urged that the non encashment of the cheque despite the account showing sufficient balance, validates the contention of the respondents not being empowered to accept a cheque. The department themselves were unsure of what they should do with the cheque obtained under threat and coercion. Unless there is a determination of tax and a demand raised as per Sections 49 and 50, there could be no deposit accepted by the Department or its officers, is the further plea on which the proceedings are assailed.

6. The learned Standing Counsel for the CGST Department would at the outset submit that there was absolutely no harassment meted out and the proceedings were within the authority of the officers as per the Statute and the Rules framed thereunder. There can be no allegation of harassment or high-handedness made when a duly authorized inspection was conducted of a business premise and residences of its Directors. It is admitted that the inspection extended to the whole day; but, however, the same was in the presence of the Directors and also ensuring their comforts. After the conclusion of the investigation and seizure of documents, again in the presence of the appellants, they were directed to report to the departmental office for recording their statements. By that time, the Advocate had reached the site of inspection and he accompanied the Directors in their car. The recording of statement also took some time and there was no forceful detention or illegal arrest. The payment made was also voluntary and the cheque was not encashed, since there is a procedure contemplated, which was in process when the writ petition was filed. The officers hence desisted from encashing the cheque when the writ petition was pending and the writ appeal too. Even now the cheque is remaining with the Department un-encashed, is the submission.

7. The learned Standing Counsel submits that Section 67 speaks of power of inspection, search and seizure, which is conferred on the officer not below the rank of Joint Commissioner, who has also been empowered to authorize in writing any other officer of the Department. An authorization is available in the files with DIN and the summons issued also has been regularized with issuance of a DIN, all of which documents are produced before this Court in a sealed cover, as per the directions issued by this Court. Exhibit P4 is a seizure order, for which no DIN is required since the instructions issued by the Central Board does not take in such orders issued at the time of inspection

in the presence of the assessees or the persons investigated. There is no question of pre-dating or post-dating, which evil is sought to be avoided by compulsory generation of DIN in the communications addressed to any person, as distinguished from an order issued in the presence of such persons under investigation. Section 74(1) notice, it is argued, does not require a determination of tax, since it is a mere initiation of proceedings for the purpose of determining tax not paid, short paid, etc. Section 74(5) speaks of a benefit conferred on the person who is proposed to be investigated to pay up tax on his own assessment, upon which there could be no issuance of notice under Section 74(1). Only if there is apprehension of further short fall, could there be a notice under Section 74(1), which is provided for under sub-section (7). The benefit under Section 74(5) is insofar as the person under investigation being not liable to any investigation, if the entire amounts due have been paid up and made liable to penalties only at a lesser percentage. Sections 49 and 50, it is pointed out, come under Chapter X with reference to 'Payment of Tax', which reckons voluntary payments and not determination of tax on scrutiny of returns as per Sections 73 & 74 of the CGST Act. The contention raised on Rule 87 is specifically controverted by reference to clause (c) to the proviso to sub-rule (3), which authorize any officer carrying out an investigation or enforcement activity to collect by way of cash, cheque or demand draft any amounts above Rupees Ten Lakhs. There are no parallel proceedings taken and now that the investigation under Section 67 has commenced the audit initiated would not be continued.

8. The learned Senior Counsel, in reply submits that even if there is an authorization earlier under Section 67, that cannot lead to an officer below the rank of Joint Commissioner arriving at a belief that such and such documents are to be seized. It is argued that the order has to be tested on the face of it, as has been held by the Constitution Bench of the Hon'ble Supreme Court in Mohinder Singh Gill v. Chief Election Commissioner [(1978) 1 SCC 405]. Reference is made to paragraph 8, which speaks of an illegal order not being validated by subsequent actions, of filing of counter affidavits, explanations and so on and so forth. The order has to stand on the recitals therein or rendered invalid if the essential requirements are not followed. There can be no additional grounds brought out later to validate an invalid order. Reliance is also placed on paragraph 37 of the decision in Chandra Singh v. State of Rajasthan [(2003) 6 SCC 545], where a three-Judge Bench has followed Mohinder Singh Gill, reiterating the principle that an order passed by a statutory authority must be adjudged on the face thereof as the reasons contained therein cannot be supplemented by an affidavit. Manohar v. State of Maharashtra [(2012) 13 SCC 14] is relied upon to contend that when State action results in civil consequences, necessarily there should be afforded an opportunity of hearing. The learned Senior Counsel would argue that before attachment there should have been a hearing afforded to the appellants. The judgment of the Delhi High Court in W.P(C) No.3618/2010 dated 29.06.2020 [Watermelon Management Services Private Limited v. The Commissioner, Central Tax, GST Delhi] is placed on record to assail the simultaneous proceedings of audit and investigation. The decision of the Division Bench of the High Court of Bombay, reported in Kaish Impex Private Limited v. Union of India [2020 SCC OnLine Bom 125] is pointed out to resist the attachment of Bank accounts.

9. The matter was heard on three days and on 05.08.2020 we had, by an interim order, specifically

directed the Department to produce the regularization of Exhibit P4, Annexures 2 & 3 Summons by generation of DIN, if the same is applicable. The learned Standing Counsel has produced the authorization of the SIO to carry out the search and seizure, under Section 67(2) with CBIC-DIN-202006DSS500009LAF2F as also the subsequent generation of DIN with respect to Annexures 2 and 3 CBIC-DIN-202006DSS5000001F47A3 and CBIC-DIN-202006DSS500007V5BAA, respectively. At the commencement of hearing on 11.08.2020 itself, the DIN were supplied to the learned Senior Counsel who appeared through Video Conferencing as also the learned instructing counsel who was before us, in person. By the conclusion of the hearing, the learned Senior Counsel and the Instructing Counsel confirmed that they have verified the generation of DIN, and accepts that it has been duly generated and is undoubtedly genuine. Immediately we notice Annexure A6 instructions issued by the Central Board. Therein any communication which does not bear the electronically generated DIN and not covered by the exceptions in paragraph 6 are rendered invalid as per para

4. The exceptions are (i) technical defects in generating DIN and (ii) communications regarding investigation, enquiry, verification, etc. to be issued with short notice or urgent situations. As far as the exceptions are concerned, they have to be regularized within 15 days of its issuance. As pointed out by the learned Standing Counsel for the appellants, the mandatory requirement does not take in a seizure order as issued at Exhibit P4, in the presence of the Directors. There is also no dispute raised by the appellants that Exhibit P4 was not served on them, on the date it bears, immediately on effecting the seizure.

10. The Circular Exhibit A6 at its beginning refers to the requirement of DIN, to ensure transparency and accountability. The 1st paragraph is extracted hereunder:

> "In keeping with the Government's objectives of transparency and accountability in indirect tax administration through widespread use of information technology, the CBIC is implementing a system of electronic (digital) generation of a Document Identification Number (DIN) for all communications sent by its offices to taxpayers and other concerned persons. To begin with, the DIN would be used for search authorization, summons, arrest memo, inspection notices and letters issued in the course of any enquiry. This measure would create a digital directory for maintaining a proper audit trail of such communication. Importantly, it would provide the recipients of such communication a digital facility to ascertain their genuineness. Subsequently, the DIN would be extended to other communications. Also, there is a plan to have the communication itself bearing the DIN generated from the system".

[underlining by us for emphasis] Evidently there are communications which would not be covered by the very nature of it and all communications are not brought under the mandatory requirement. Exhibit P4 seizure order, by the nature of its issuance, to the appellants in their presence would not be included, as there could be no suspicion raised of its issuance, on the date and time it bears and its author. The objective is also for the assessee to ensure the genuineness of the document as having been issued on the date and by the officer who has issued it. This prevents any abuse by the Departmental officers of pre-dating communications and ratifying actions by authorizations

subsequently made out in the files. We do not think, Exhibit P4 issued to the appellants, which is also an order of seizure of documents, made in the presence of the appellants, to effectuate seizure requires a DIN or even subsequent generation of the same. The invalidity argued on that ground does not survive. As far as summons at Annexures A2 and A3, there is proper generation of DIN, which has been verified by the learned Senior Counsel and the Instructing Counsel and communicated to us by the time the hearing concluded. The argument addressed on the basis of Annexure A6 does not, hence, stand for further consideration.

11. The allegations raised of harassment and high-handedness cannot be considered in a petition under Article 226 of the Constitution. An operation carried out by a statutory authority invested with the powers of search, inspection and seizure, by reason only of such activities having been carried out in the residences and offices of any person under investigation for a long time, cannot be labeled as harassment or high-handed. Nor could the inconvenience caused to the person under investigation, especially of remaining in the premises for the entire duration, termed to a detention pursuant to an arrest. A search and seizure operation necessarily brings with it certain discomforts, which are to be endured in the best interest of the person under investigation who witnesses every action of the inspection team. The allegations are also not substantiated which, we perfectly understand, are impossible of substantiation, especially in a petition under Article 226. Apart from the invalidity urged of the very search, inspection and seizure, we are not considering any of the issues so raised in the writ petition and in the appeal. We do not express any opinion and the appellants, if desirous, could take appropriate proceedings with substantiating material.

12. We shall now consider the validity of the investigation under Section 67. Section 67(1) and (2) reads as under:

> "67. Power of inspection, search and seizure (1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that -
>
> (a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or
>
> (b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.
>
> (2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things,

which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:

xxx xxx xxx".

13. Section 67 (1) empowers an officer not below the rank of Joint Commissioner with the authority to inspect, search and seize as also empowers such officer to authorize in writing any other officer to inspect any place of business or other premises of a taxable person. Likewise, sub-section (2) enables any officer below the rank of Joint Commissioner to carry out by himself, or authorize in writing, any other officer to search and seize such goods, documents, books or things. The reason to believe, which has to be entered into by an officer not below the rank of Joint Commissioner as per sub-section (2) of Section 67, to carry out by himself a search and seizure operation or to authorize another officer, is with respect to the fact that goods liable to confiscation or documents or books or things which in his opinion would be useful for or relevant to any proceedings under this Act, are secreted in any place. Hence, it is not a reason to believe that the specific document or books or things which is seized would be useful for or relevant to any proceedings under this Act. If an officer not below the rank of Joint Commissioner has reason to believe that any material, useful or relevant to any proceedings under the Act, are secreted in a place, then he is empowered to carry out by himself or authorize in writing any other officer to carry out the search and seizure.

14. The authorization under Form GST INS-01 having CBIC-DIN is produced before us. The SIO who has seized the documents, has been authorized under Section 67(2) to search the premises of Kerala Communicators Cable Ltd., Thoundayil Road, Panampilly Nagar, Ernakulam-682 020 with such assistance as may be necessary to seize and produce books or documents or other things relevant to the proceedings under the Act, if found by such authorized officer and for production of the same before the Directorate General, GST Intelligence, Kochi. The Directorate General is an Officer above the rank of Joint Commissioner. The authorization has been issued after recording the fact that the Directorate General has reason to believe, on information presented, that goods liable to confiscation/documents relevant to the proceedings under the Act are secreted in the business/residential premises detailed therein. In the scheme of Section 67 and the empowerment of an officer not below the rank of Joint Commissioner who has further been empowered with the power to authorize any other officer to search and seize from the business or other premises of a taxable person, we do not find any infirmity in Exhibit P4 as has been alleged on the basis of the dictum of Mohinder Singh Gill or Chandra Singh.

15. The Hon'ble Supreme Court in Mohinder Singh Gill specifically found that a statutory order has to be judged by the reasons mentioned therein. The said dictum does not apply in the scheme of Section 67, which empowers an officer not below the rank of a Joint Commissioner not only to inspect, search and seize from the business premises of a taxable person, but also empowers to authorize another officer to carry out the search and seizure. Reason to believe, at the risk of repetition, to be entered into by the officer not below the rank of Joint Commissioner, is that goods liable to confiscation or material relevant to any proceedings under the Act is secreted in a place.

Such reason to believe is available in the authorization and the further reason to believe, as is seen from Exhibit P4, is of the authorized officer as to the prima facie relevance attached to the documents, books and things seized. The authorization is also to search and seize any goods or documents or other things relevant to the proceedings under the Act as found by the authorized officer. We do not think that the reason to believe as found in Exhibit P4 entered into by the authorized officer, is one spoken of under sub-section (2) of Section 67; but is a mandatory requirement flowing from the authorization itself. The SIO, according to us, has been properly authorized under section 67(2) to carry out the search and seizure operations in the premises of the appellants. The reason to believe as seen from Exhibit P4 issued by the SIO, is a requirement as per the authorization and does not at all vitiate or invalidate the order.

16. The next contention raised by the learned Senior Counsel is with respect to there being no permission for simultaneous proceedings issued requiring an audit and an investigation. The decision of the Division Bench of the Delhi High Court in Watermelon Management Services Private Limited was a case in which the Commissioner, Central Tax and the Director General of Goods and Services Tax Intelligence were conducting parallel investigation. The Commissioner hence submitted before Court that the investigation has now been handed over to the Director General itself. The question arose also of an attachment made without any proceeding being launched under Section

74. The Division Bench did not interfere with the attachment, but directed the Director General to conclude the investigation within a period of three months. There is no dictum discernible and the facts are quite distinct and the decision has absolutely no application.

17. Here the challenge is to simultaneous proceedings of investigation having been commenced when already an audit was in progress. Audit under section 65 is a routine procedure to be carried out by the Commissioner in such frequency and in such manner as prescribed in the rules; which is independent of an investigation under Section 67. Section 67 is a more onerous procedure which can be initiated only on the satisfaction of an Officer not below the rank of a Joint Commissioner of, suppression of taxable transactions, excess claim of input tax credit, contravention of the provisions of the Act and Rules, keeping of goods and accounts in contravention of the provisions, escapement of tax, secreting of goods or material liable to confiscation or relevant or useful in any proceedings under the Act and any act leading to evasion of tax. Investigation under Section 67 is no routine procedure as is an audit under section 65. In this context we cannot but observe that the appellants, on their own admission, were issued with notice dated 17.03.2020, Exhibit P2, calling for details of the LCOs. There is nothing stated in the writ petition as to how and in what manner the appellants responded to the said notice. Then by Exhibit P5 dated 15.05.2020 an audit under Section 65 was initiated and later in June the investigation under section

67. Though we are not going into the merits of the suppression alleged, the appellants themselves say that it is with respect to the quantum on which GST is payable; whether it should be on the gross

amounts collected by the LCO. Looking at the various proceedings it cannot be, for a moment, believed that the appellants were taken off guard by the abrupt proceedings taken under Section 67 as they would allege. We do not find any infirmity in the audit and investigation proceeding being continued simultaneously. But the learned Standing Counsel informs us that in the wake of the investigation commenced, the audit would not be proceeded with.

18. The learned Senior Counsel has seriously challenged the receipt of the cheque not only as a coercive act under duress, but also as not sanctioned by the Statute or the Rules. Any deposit of money, according to the learned Senior Counsel, has to be after determination of tax under Sections 49 and 50 and by generating the forms as prescribed under the Rules. In such circumstance, when no tax is assessed and there exists no demand, there could not be any deposit taken or cheque accepted under Section 74(5), is the argument. Looking at the provisions, we are unable to accept the above contention.

19. Sections 49 and 50 are seen at Chapter X of the CGST Act, which has the nominal heading 'Payment of Tax'. Section 49 speaks of deposit made towards tax, interest, penalty, fee or any other amount in the various modes spoken of therein, including NEFT, which are subject to conditions and restrictions as prescribed. The credit of any payment made is effected to the electronic cash ledger of such person making the deposit, which also is maintained as prescribed in the rules. Section 50 speaks of interest on delayed payment of tax and the rate and manner in which it has to be computed. Sections 49 and 50 essentially are provisions enabling voluntary payments which, when made, are credited in the electronic cash ledger in the form prescribed under sub-section (1); with the deposit being made in the challan as generated under sub-section (2). The generation of the challan as spoken of in sub-section (2) is also by any person or a person on his behalf.

20. Chapter XII speaks of 'Assessment', which by every registered person under Section 59 is a self assessment, under Section 60 a provisional assessment made by the proper officer on a request made by the taxable person and scrutiny of returns under Section 61 made independently by the proper officer to verify its correctness. After scrutiny of returns notice is issued on the discrepancies noticed. If no satisfactory explanation is furnished within a period of thirty days or the registered person does not accept the discrepancies by making corrective measures, the officer can initiate appropriate action, including those under Sections 65, 66 and 67, and proceed to determine the tax and other dues under Section 73 or 74. Assessments in the event of non-filing of returns, unregistered persons as also special cases are spoken of in Sections 62, 63 and 64;

21. The determination of tax arises under Sections 73 and 74 under circumstances either of non-payment, short payment, erroneous refund, wrongly availed or utilized input tax credit etc. Section 74 is the determination contemplated when there is fraud, willful-misstatement or suppression of facts and Section 73 when such allegation is not there. Hence, when an investigation is initiated under Section 67, the assessee is immediately brought to notice of the proceedings initiated. Before proceeding under Section 74(1) for determination of tax, interest and penalty payable, at any point after initiation of proceedings but prior to a notice under Section 74(1), the assessee is enabled under sub-section (5) of Section 74 to pay the amount of tax along with interest under Section 50 and a penalty equivalent to 15% on the basis of a self assessment or as ascertained

by the proper officer. On such amounts being paid, the proper officer under sub-section (6) shall desist from serving any notice under sub-section (1). Then proceedings can be resumed under sub-section (1) only if the proper officer is of the opinion that the amount paid falls short of that actually payable. Again, after issuance of notice under Section 74(1), the assessee is enabled to pay the amounts with interest and penalty equivalent to 25% under sub-section (8). However, when an order is issued under sub-section (9) by the proper officer pursuant to a notice issued under sub-section (1); under sub-section (11) in addition to the tax and interest penalty equivalent to 50% of the tax payable is mandatory. The scheme, hence, is such that an assessee on being informed of the initiation of a proceeding being enabled to pay tax, even before a notice for determination is issued, with interest and penalty of 15%. The penalty after issuance of notice for determination is enhanced to 25% and on service of an order stands enhanced to 50%. We do not think that there is any scope for determination of tax or interest under Sections 49 and 50 and the determination has to be made under Chapter XV 'Demands and Recovery', containing inter alia Sections 73 and 74.

22. When an investigation is in progress and the premises of any person is being searched and seizure effected; again at any time, in the course of the proceedings, the person is enabled payment of tax, interest and penalty at the reduced rate of penalty so as to save himself from a higher penalty. In the course of inspection, often a generation of the prescribed form and deposit in accordance with the Rules may not be possible. This is why Section 87(3) proviso speaks of the restriction for deposit upto ten thousand rupees per challan, in case of over the counter payments being exempted in situations under clauses

(a), (b) and (c) of that proviso. Sub-clause (c) of the proviso to Section 87(3) reads as under:

> "(c) Proper officer or any other officer authorised for the amounts collected by way of cash, cheque or demand draft during any investigation or enforcement activity or any ad hoc deposit".

An officer above the rank of a Joint Commissioner or one authorized by such officer carrying out the investigation or enforcement activity is so exempted and can deposit any amounts collected, by way of cash, cheque or demand draft, during the investigation or enforcement activity. This does not require generation of the Forms prescribed. The proper officer or the one authorized, hence is enabled to receive cash, cheque or demand draft in the course of an investigation or enforcement activity from the tax payer. We do not find any extortion having been effected against the statute and Exhibit P3 specifically indicates that it is a voluntary payment, although it is made under protest.

23. The learned Instructing Counsel had an argument with respect to Rule 142 that unless an intimation is served as provided under sub-rule (1A), there cannot be a deposit made or taken under Section 74(5). We are afraid, the argument cannot be countenanced. Rule 142, in fact, is in consonance with our interpretation of the payment of tax under sub-sections (5), (8) and (11) of Section 74. Sub-rule (1)(a) of Rule 142 speaks of a notice issued inter alia under Section 74 in the prescribed form and sub-rule (1)(b) of a statement, inter alia under subsection (3) of both Sections 73 and 74, which contains the details of tax payable for periods other than that covered under a

notice issued under sub-section (1), which stages, we have not reached in the present case. Sub-rule (1A) speaks of communication of the details of tax, interest and penalty as ascertained by an officer, in Part A of Form GST DRC-01A, prior to a notice under sub-section (1) of Section 73 or Section 74, as the case may be. The Form DRC-01A has the heading "Intimation of Tax ascertained as being Payable under Section 73(5)/74(5)'. Hence, when the proper officer contemplates issuance of a notice under Section 73(1) or Section 74(1), prior to that he has to issue Form DRC-01A showing the details of tax, interest and penalty as ascertained by the said officer. This does not, however, deviate from the fact that even before that, the assessee could voluntarily make a deposit under sub-section (5) of Section 73 or Section 74. Sub-rule (1A) was brought in by notification No.49.2019-Central Tax, dated 9.10.2019, with effect from 09.10.2019. In tune with the said provision, sub-rule (2) was amended with addition of certain words as seen hereunder:

> "R.142(2) Where, before the service of notice or statement, the person chargeable with tax makes payment of the tax and interest in accordance with the provisions of sub-section (5) of section 73 or, as the case may be, tax, interest and penalty in accordance with the provisions of sub-section (5) of section 74, or where any person makes payment of tax, interest, penalty or any other amount due in accordance with the provisions of the Act, whether on his own ascertainment or, as communicated by the proper officer under sub-rule (1A), he shall inform the proper officer of such payment in FORM GST DRC-03 and the proper officer shall issue an acknowledgement, accepting the payment made by the said person in FORM GST DRC-04"

The above underlined portion specifically indicates that the deposit could be made either on the tax payer's own ascertainment or as communicated by the proper officer under sub-rule (1A). Prior to introduction of sub-rule (1A), sub-rule (2) spoke of payment of tax and interest in accordance with the provisions of sub-section (5) of Sections 73 and 74 and information to the proper officer in the prescribed form, which has to be acknowledged by the proper officer. By the amendment of 2019, the tax payer, as it was prior to that, could make own assessment and pay the tax, interest and penalty under sub-section (5) of Sections 73 or 74 and was given an additional opportunity, by way of an intimation issued by the proper officer of the ascertainment of the tax, interest and penalty prior to the notice under sub-section (1) of Sections 73 and 74 for the purpose of paying such amounts at the reduced rate of penalty of 15%. Rule 142 as it stands in 2019 does not at all speak of deposit under Section 74(5) being made only after an intimation is served by the proper officer. We have from the provisions of the statute clearly found otherwise.

24. We had, on the last date of hearing specifically informed the learned Senior Counsel as also the Instructing Counsel that if the appellants require the cheque back on the assertion of a coercion having been effected, we would so direct especially when the cheque is remaining unencashed. We also directed that an affidavit be filed to the said effect by the appellants themselves. No such affidavit has been filed and no insistence for the return of the cheque has been made. We have also found that the issuance of the cheque is voluntary and its receipt by the SIO, is sanctioned by the statute and the rules prescribed there under. Hence, the Department could proceed for encashment of the cheque in accordance with the procedure prescribed.

25. The last contention raised by the learned Senior Counsel was the attachment made of bank accounts. We kept it for last since, if Section 67 proceedings are found to be illegal, then definitely attachment would also stand vacated. We are also of the opinion that it may not be proper for us to look at the attachment orders which have been issued subsequent to the writ petition having been dismissed. We are in appeal from the judgment of the learned Single Judge and it may not be proper for us to go beyond the issues urged and considered by the learned Single Judge in an appeal. The learned Senior Counsel however vehemently urged that the appeal is a continuation of the writ proceedings. Kaish Impex Private Limited, was also relied on.

26. Kaish Impex Private Limited, the decision of a Division Bench of the Bombay High Court, is not applicable to the facts of the instant case. Kaish Impex Private Limited was summoned with reference to an enquiry against a taxable person, one Maps Global. The allegation against Maps Global was fraudulent availing of input tax credit. On scrutiny of bank accounts of the said taxable person, it was noticed that an amount was transferred to one Balajee Enterprises who had transactions with Kaish Impex Private Limited. Simultaneous to the summons issued to Kaish Impex Private Limited, their Bank accounts were also attached. The attachment order specifically spoke of proceedings under Sections 67 and 70 as against Kaish Impex Private Limited. The power to provisionally attach, for the purpose of protecting revenue, is available under Section 83. Such attachment is also in the context of proceedings initiated under the specified Sections of the GST Act. The Division Bench found that Section 70 is not specified in Section 83 and there was no proceeding under Section 67 against Kaish Implex Private Limited. The attachment therein was of an entity who was twice removed from the taxable person subjected to investigation. This was the reasoning on which attachment was interfered with. Here, the Bank accounts attached are of the taxable person, against whom an enquiry is initiated under Section 67.

27. The learned Senior Counsel also argued based on Manohar that there is an implied requirement of hearing even where the Rules are silent, as a necessary concomitant of the principles of natural justice, which obviously has not been granted; prima facie vitiating the attachment. We are afraid, the said principle does not apply insofar as an attachment made to protect the interest of the revenue. If notice is issued before attachment, then the account holder could as well defeat the purpose, by withdrawing the amounts kept in such accounts. The rule for a hearing does not arise prior to attachment. Whether it arises before seeking disbursement of the amounts remaining in the account, we are not called upon to adjudicate as of now. We leave the matter to be adjudicated before the appropriate authorities or forum. We do not think that the proceedings initiated under Section 67 is improper, illegal or that the actions projected before us were in any manner proceeded with, in an arbitrary or high-handed fashion.

We dismiss the appeal, leaving the parties to suffer their respective costs.

Sd/-

K.VINOD CHANDRAN JUDGE Sd/-

T.R.RAVI JUDGE Vku/-

APPENDIX APPELLANTS' ANNEXURES:

ANNEXURE A1 TRUE COPY OF THE STATEMENT OF ACCOUNT OF THE COMPANY OF THE PETITIONERS DURING THE PERIOD 09.06.2020 TO 15.07.2020.

ANNEXURE A2 TRUE COPY OF THE UNDATED SUMMONS NO.82/2020 ISSUED BY THE 4TH RESPONDENT TO 1ST PETITIONER.

ANNEXURE A3 TRUE COPY OF THE SUMMONS NO.83/2020 DATED 09.06.2020 ISSUED BY THE 4TH RESPONDENT TO THE 2ND PETITIONER.

ANNEXURE A4 TRUE COPY OF THE SUMMONS NO.110/2020 DATED 19.06.2020 ISSUED BY THE 4TH RESPONDENT TO THE 1ST PETITIONER.

ANNEXURE A5 TRUE COPY OF THE SUMMONS NO.111/2020 DATED 19.06.2020 ISSUED BY THE 4TH RESPONDENT TO THE 2ND PETITIONER.

ANNEXURE A6 TRUE COPY OF THE CIRCULAR NO.122/41/2019-GST DATED 05.11.2019 ISSUED BY COMMISSIONER GST-INV.

ANNEXURE A7 TRUE COPY OF THE COMMUNICATION DATED 15.07.2020 SENT TO THE BRANCH MANAGER OF THE BANK ISSUED BY THE ADDITIONAL DIRECTOR GENERAL, DIRECTORATE GENERAL OF GOODS AND SERVICES TAX INTELLIGENCE, ZONAL UNIT KOCHI. ANNEXURE A8 TRUE COPY OF THE COMMUNICATION DATED 15.07.2020 SENT TO THE BRANCH MANAGER OF THE STATE BANK OF INDIA ISSUED BY THE ADDITIONAL DIRECTOR GENERAL, DIRECTORATE GENERAL OF GOODS AND SERVICES TAX INTELLIGENCE ZONAL UNIT KOCHI.

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