IN THE HIGH COURT OF JUDICATURE AT MADRAS

RESERVED ON : 15.11.2021

PRONOUNCED ON : 4.03.2022

CORAM

THE HONOURABLE MR.JUSTICE **C.SARAVANAN**

W.P.No.20067 of 2021
and WMP.No.21321 of 2021

(Through Video Conferencing)

M/s.MNS Enterprises
(Represented by its Proprietor
Shri.Sheik Dawood) ... Petitioner

vs

The Additional Director General
Directorate of GST Intelligence,
Tower-II, BSNL Building,
Greams Road,
Chennai 600 006. ... Respondent

Prayer: Petition filed under Article 226 of the Constitution of India to issue a Writ of Mandamus to direct the respondent to refund the amount of Rs.88,17,754/- recovered by the respondent, from the customer of the petitioner forthwith.

For Petitioner : Mr. G.Nataajan

For Respondents : Mr.Rajnish Pathiyil
Senior Panel Counsel.

O R D E R

The question that falls for consideration in this writ petition is whether the petitioner can seek for a mandamus for refund of amounts lying in the petitioner's electronic cash ledger ?

2. The writ petitioner is a proprietary concern and is represented by its proprietor Sheik Dawood. This writ petition has been filed for a Mandamus to direct the respondent to refund Rs.88,17,754/- lying in the petitioner's Electronic Ledger under Chapter IX of CGST Rules, 2017. The aforesaid Electronic Ledger of the petitioner has been frozen and therefore, the petitioner is unable to utilize the above amount.

3. The case of the petitioner is that the respondent had issued a summons to the petitioner's proprietor Sheik Dawood. Thereafter, the petitioner's proprietor was also arrested on 01.09.2021 and remanded to

judicial custody. It is further case of the petitioner that Statements were obtained from the proprietor of the petitioner and during interrogation a letter dated 31.08.2021 was extracted from the petitioner's proprietor on 01.09.2021 to make it seem as if on the petitioner's request, one of the customer namely, Nobal Tech Industries Pvt. Ltd., was to remit amounts due to the petitioner as outstanding to be directly paid into the petitioner's aforesaid GSTN Account bearing No. GSTN : 33ASMPS4462L1Z6.

4. It is the case of the petitioner that this letter was obtained under coercion and therefore, the amounts which is lying in the electronic ledger of the petitioner has hampered with day-to-day business of the petitioner inasmuch as it has resulted in a liquidity crunch and the petitioner is unable to pay either to the suppliers or pay salary to the employees.

5. It is further submitted that after the proprietor of the petitioner was arrested on 01.09.2021, this writ petition was prepared on 07.09.2021 and filed on 09.09.2021 and thus, the petitioner has withdrawn the statement immediately. It is the case of the petitioner that as per letter dated 01.09.2021, the amount which the said customer was to pay the amount

directly into the GSTN Account of the petitioner has been resiled/retracted in the affidavit filed in support of the present writ petition.

6. It is further submitted that the petitioner was under judicial custody till 31.10.2021 and was released only after the expiry of the statutory period of remand under Section 167 (2) of Cr.P.C.

7. The learned Counsel for the petitioner has placed reliance on the decision of the learned Single judge of this Court in the case of ***V.N.Mehta & Company vs. Assistant Commissioner***, ***Headquarters preventive unit, Chennai*** reported in **2020 (34) G.S.T.L.148(Mad.)**, wherein, while examining Section 79 of CGST Act, a learned Single Judge of this Court has held that Section 79 (1) of the Act contemplates that only if any amount payable by a person to the Government under any of the provisions of the Act or Rules therein is not paid, the proper Officer can proceed to recover the amount from one or more method referred therein. It is therefore submitted that the amount payable by a person will only mean only the amount that is payable after a proper determination of the amount in a manner known to law.

8. The learned counsel for the petitioner submits that by forcing the customer to directly remit the amount into the petitioner's GSTN account without issue of Show Cause Notice was without authority of law, the respondent has practically crippled the business of the petitioner apart from placing the proprietor of the petitioner under judicial custody for a period of two months and contrary to safeguards prescribed under the Act.

9. The learned counsel for the petitioner further submits that when the law requires a particular thing to be done in a particular manner then it has to be done in that manner. The learned counsel for petitioner further submits that Section 79 of the CGST Act is similar to a recovery mechanism prescribed under Section 11 of the Central Excise Act, 1944, Section 87 of the Finance Act, 1994 under Chapter V of the Finance Act, 1994. The learned counsel for the petitioner further states that the proper method under the CGST Act for the Department is to first throughly investigate and thereafter issue a proper show cause notice under Sections 73 and 74 of CGST Act, 2017 and adjudicate to same in the manner prescribed under the said Act. He further submits that this provision is similar to 11 A of the Central Excise Act,

1944 and 73 of Finance Act, 1994. He therefore submits that recovery of tax can be only in the manner known to law and therefore recovery of the amount as tax would be contrary to Article 265 of the Constitution of India. The learned Counsel for petitioner has also placed reliance on the decisions of the Bombay High Court and the Chattisgarh High Court in the following two cases:

1) New India Civil Erectors Pvt. Ltd., Vs. Union of India reported in 2020 (43) G.S.T.L. 17(Bom.).

2) S.Kumar's Associates Vs. Addl. Commr. (Prev.) of Cus., C.Ex. & S.T., Bilaspur reported in 2020 (38) G.S.T.L.29(Chattisgarh).

10. Defending the action of the petitioner, the learned counsel for the respondent submits that under the provisions under the CGST Act, 2017 there is a special dispensation and therefore, the decisions cited by the learned counsel for petitioner are not of no relevance. The learned counsel for respondent submitted that the petitioner has himself admitted and had given a voluntary statement on 31.08.2021 and 1.09.2021 and had further sent a request to one of the customers namely Nobal Tech Industries Pvt. Ltd., to

directly remit the amounts due into petitioner's GST Account having GSTN : 33ASMPS4462L1Z6. That apart, the learned counsel for respondent further submits that the statement has also been obtained from one Joseph Selvaraj, who is the partner of M/s Coral Steel having business in Chennai, wherein, he has admitted that he prepared fake GSTN Bills and Invoices to facilitate the writ petitioner to avail input tax credit wrongly based on fictitious entries which was used by the petitioner to discharge the GST liability under the provisions of the CGST Act, 2017.

11. The learned counsel for the respondent submits that the department has unearth fraud of approximately Rs.11.80 Crores fraud committed by the petitioner on the strength of fictitious invoices to discharge the tax liability and the amount which is lying in the GSTN account for a sum of Rs. 88,17,754/- is a mere 7% of the estimated tax liability, which is pegged at Rs.11.80 Crores.

12. The learned counsel for respondent further submits that pursuant to the letter dated 01.09.2021 of the proprietor of the petitioner, a notice was also issued to the petitioner's aforesaid customer, namely, Nobal Tech

Industries Pvt. Ltd., on 2.09.2021, asking the said Nobal Tech Industries Pvt. Ltd., to remit the amount directly to the aforesaid GSTN account of the petitioner. He further submits that a proper notice in GST DRC - 13 was issued to the said Nobal Tech Industries Pvt. Ltd., under Section 79 (1) (c) read with Rule 145 (1) of GST Rules, 2017. It is further submitted that on the date when the aforesaid letter was given by the proprietor of the petitioner reportedly an amount of Rs.75 lakhs was lying in the account of the petitioner's bank account which has been separately attached. The learned counsel for the respondent submits that there are 7 more vendors apart from the aforesaid Nobal Tech Industries Pvt. Ltd. and approximately, a sum of Rs.2 Crores is due from these 7 vendors and that the proprietor of the petitioner in his statement dated 01.09.2021 had requested the Department to take appropriate action as deemed fit to recover the GST liability in respect of the petitioner and the petitioner's Sister Concern, namely, M/s.Noordeen Enterprises.

13. The learned counsel for the respondent further submits that the investigation will take some more time and therefore, there should not be any concession given to the petitioner as the petitioner has admittedly indulged in

large scale fraudulent availing of credit on the strength of fake and fictitious invoices. The learned counsel for the respondent has relied on the following decisions:

i. ***S.S.Industrie*** *Vs.* ***Union of India*** *MANU/GJ/1609/2020*
ii. ***Radha Krishnan Industries*** *Vs. State of Himachal Pradesh and Ors. MANU/SC/0293/2021*
iii. ***Sri Marg Human Resources Pvt. Ltd.*** *Vs.* ***The Principal Additional Director General and Ors.*** *Order in W.P. No.11284 of 2021 dated 26.05.2021.*
iv. ***The Principal Additional Director General and Anr.*** *Vs.* ***Sri Marg Human Resources Pvt. Ltd.***
v. ***P.V. Ramana Reddy and Ors.*** *Vs.* ***Union of India*** *MANU/TL/OO64/2019"*

14. The learned counsel for the respondent submits that since under Section 79 of the of the CGST Act, 2017 there is a special dispensation for the Department to initiate such recovery proceedings even before there is a proper determination of tax liability, the writ petition filed for the relief is devoid of merits.

15. By way of rejoinder, the learned counsel for the petitioner submits that power under Section 79 of CGST Act has to be exercised only after there

is a proper determination of tax liabilities under Chapter XV of the CGST Act. If the Department wants to resort provisional attachment, the only method prescribed is under Section 83 of the aforesaid Act.

16. The learned counsel for the respondent submits that the writ petitioner has admitted that the petitioner's brother is only a name sake person and the entire business is carried out by the petitioner.

17. The learned counsel for the petitioner submits that as far as the writ petitioner is concerned atbest the total liability that the writ petitioner can be subjected to based on the projections of the respondent is about Rs.5.6 Crores and that a sum of Rs. 5.6 Crores in the name of the writ petitioner's Sister concern, namely, M/s.Noordeen Enterprises.

18. Heard the learned counsel for the petitioner and the learned counsel for the respondent. I have considered the arguments advanced by the learned counsel for the petitioner and the learned counsel for the respondent and perused the documents and the judgments referred to on behalf of the

petitioner and the respondent and the provisions of the CGST Act, 2017 and CGST Rules, 2017.

19. As per Section 49(7) of the Act, all liabilities of a taxable person under this Act shall be recorded and maintained in an electronic liability register in such manner as may be prescribed.

20. Chapter IX of CGST Rules 2017 deals with payment of tax. As per Rule 85(1) of the CGST Rules, 2017 a person liable to pay tax, interest, penalty, late fee or any other amount on the common portal and all amounts payable by him shall debit from the electronic Liability Register specified under subsection (7) of section 49 maintained in FORM GST PMT-01.

21. As per Rule 85 (2), the electronic liability register of the person can be debited by-

> " (a) the amount payable towards tax, interest, late fee or any other amount payable as per the return furnished by the said person;
> (b) the amount of tax, interest, penalty or any other amount payable as determined by a proper officer in pursuance of any proceedings under the Act or as ascertained by the said person;

(c) the amount of tax and interest payable as a result of mismatch under section 42 or section 43 or section 50; or (d) any amount of interest that may accrue from time to time."

22. The petitioner here indeed asking for refund of the amount which has been credited into the petitioner's GSTN account. Whether the amounts was directed to be paid by the petitioner's aforesaid customer namely Nobal Tech was under coercion or it was a voluntarily paid at the behest of the petitioner is a disputed question of fact which cannot be decided in a summary proceedings under Article 226 of the Constitution of India. For claiming refund of any amount lying in excess the petitioner has to work out the remedy under Section 54 of the CGST Act, 2017. Section 54 of the CGST Act, 2017 reads as under:

Section 54. Refunds;

"Any Person claiming refund of any tax and interest, if any, paid on such tax or any other amount paid by him, may make an application before the expiry of two years from the relevant date in such form and manner as may be prescribed:

Provided that a registered person, claiming refund of any balance in the electronic cash ledger

in accordance with the provisions of sub-Section (6) of Section 49, may claim such refund in the return furnished under Section 39 in such manner as may be prescribed."

23. To implement the aforesaid scheme, under Chapter X has been framed under CGST Rules, 2017. The Hon'ble Supreme Court in the case of ***Radhakrishnan Industries Vs. State of Himachal Pradesh and Ors.,*** (2021) 6 SCC 771 while dealing with the provisions of the Himachal Pradesh Goods and Service Tax Act, 2017 and Rule 159 dealing with provisional attachment of property of the Himachal Pradesh Rules, 2017 framed and certain guidelines and observed as under:

> "*(i) The Joint Commissioner while ordering a provisional attachment Under Section 83 was acting as a delegate of the Commissioner in pursuance of the delegation effected under Section 5 (3) and an appeal against the order of provisional attachment was not available under Section 107 (1);*
>
> *(ii) The writ petition before the High Court under Article 226 of the Constitution challenging the order of provisional attachment was maintainable;*
>
> *(iii) The High Court has erred in dismissing the writ petition on the ground that it was not maintainable;*
>
> ***(iv) The power to order a provisional***

attachment of the property of the taxable person including a bank account is draconian in nature and the conditions which are prescribed by the statute for a valid exercise of the power must be strictly fulfilled;

(v) The exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the Government Revenue. Before ordering a provisional attachment the Commissioner must from an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore, it is necessary so to do for the purpose of protecting the interest of the Government Revenue.

(vi) The expression "necessary so to do for protecting the Government revenue" implicates that the interests of the Government Revenue cannot be protected without ordering a provisional attachment;

(vii) The formation of an opinion by the Commissioner under Section 83 (1) must be based on tangible material bearing on the necessity of ordering a provisional attachment for the purpose of protecting the interest of the Government Revenue;

(viii) In the facts of the present case, there was a clear non-application of mind by the Joint Commissioner to the provisions of Section 23, rendering the provisional attachment illegal;

(a) An entitlement to submit objections on the ground that the property was or is not liable to attachment; and

(b) An opportunity of being heard;

(ix) There has been a breach of the mandatory requirement of Rule 159 (5) and the Commissioner was clearly misconceived in law in coming into conclusion that he had a discretion on whether or not to grant an opportunity of being heard;

(x) The Commissioner is duty bound to deal with the objections to the attachment by passing a reasoned order which must be communicated to the taxable person whose property is attached;

(xi) A final order having been passed under Section 74 (9), the proceedings under Section 74 are no longer pending as a result of which the provisional attachment must come to an end; and

(xii) The appellant having filed an appeal against the order Under Section 74 (9), the provisions of Sub-Section 6 and 7 of Section 107 will come into operation in regard to the payment of the tax and stay on the recovery of the balance as stipulated in those provisions, pending the disposal of the appeal."

24. As per Rule 86(1) Electronic Credit Ledger shall be maintained in **FORM GST PMT-02** for each registered person eligible for input tax credit under the Acton the common portal and every claim of input tax credit under the Act shall be credited to the said ledger. As per Rule 86 (2) The electronic credit ledger shall be debited to the extent of discharge of any liability in

accordance with the provisions of Section 49. (3) Where a registered person has claimed refund of any unutilized amount from the electronic credit ledger in accordance with the provisions of section 54, the amount to the extent of the claim shall be debited in the said ledger. (4) If the refund so filed is rejected, either fully or partly, the amount debited under sub-rule (3), to the extent of rejection, shall be re-credited to the electronic credit ledger by the proper officer by an order made in **FORM GST PMT-03**.

25. The Hon'ble Supreme Court in **State Of Uttar Pradesh** Vs. **Singhara Singh And Others**, 1963 AIR 358 : 1964 SCR (4) 485, has held a when law mandates a particular thing to be done in a particular manner, then it has to be done in the aforesaid manner. Therefore, the amount which has been deposited into the Electronic Liability Register of the petitioner by the petitioner's customer / client cannot be ordered to be refunded directly. The deposit into the electronic cash ledger of the petitioner can be made not only by the petitioner, but also by any other person on behalf of the petitioner. This is evident from a reading of Section 49 of the CGST Act, 2017 read with Rule 86 of the CGST Rules, 2017.

26. As mentioned above, as far as refund of any amount lying unutilised in the Electronic Liability Register is concerned, such refund is governed by Section 54 of the CGST Act, 2017 read with provisions of Chapter X of the CGST Rules, 2017. This is not a case where the amount has been attached in terms of Section 83 of the CGST Act, 2017 read with Rule 159 in Chapter XVIII of the CGST Rules, 2017.

27. If the payment was coerced to be paid into the Electronic Liability Register of the petitioner by obtaining a letter from the petitioner, it may be ingenious way of creating liquidity crunch to ensure such amount is not frittered away. As mentioned above, whether the payment was under compulsion or otherwise, cannot be decided in this summary proceeding. It is for the petitioner to work out the remedy under law for refund of the amount under Section 54 of the CGST Act, 2017 read with provisions of Chapter X of the CGST Rules, 2017.

28. Even otherwise, considering the fact that there are serious allegations against the petitioner of having an availed fraudulent input tax credit in the Electronic Credit Ledger on the strength of bogus and fictious

input tax invoice for discharging GST liability, with no supply, no refund can be ordered straight away in this proceedings.

29. At the same time, the invocation of Section 79(1)(c) at the moment is pre-mature. Recovery under Section 79 of the Act has to be in accordance with Chapter XVIII of CGST Rules, 2017. Recovery under Section 79(1)(c) of the Act has to be in consonance with Rule 145 of the CGST Rules, 2017. For an easy refer, both the provisions are re-produced below:-

Section 79(1)(c) of the Act	***Rule 145 of the Rules***
79. (1) Where any amount payable by a person to the Government under any of the provisions of this Act or the rules made thereunder is not paid, the proper officer shall proceed to recover the amount by one or more of the following modes, namely:— *(a) .....* *(b) .....* *(c) (i) the proper officer may, by a notice in writing, require any other person from whom money is due or may become due to such person or who holds or may subsequently hold money for or on account of such person, to pay to the Government*	*145. Recovery from a third person.- (1) The proper officer may serve upon a person referred to in clause (c) of sub-section (1) of section 79 (hereafter referred to in this rule as -the third person?), a notice in FORM GST DRC-13 directing him to deposit the amount specified in the notice.* *(2) Where the third person makes the payment of the amount specified in the notice issued under sub-rule (1), the proper officer shall issue a certificate in FORM GST DRC14 to the third person clearly indicating the details of the liability so*

Section 79(1)(c) of the Act	*Rule 145 of the Rules*
either forthwith upon the money becoming due or being held, or within the time specified in the notice not being before the money becomes due or is held, so much of the money as is sufficient to pay the amount due from such person or the whole of the money when it is equal to or less than that amount; *(ii) every person to whom the notice is issued under sub-clause (i) shall be bound to comply with such notice, and in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary to produce any pass book, deposit receipt, policy or any other document for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary;* *(iii) in case the person to whom a notice under sub-clause (i) has been issued, fails to make the payment in pursuance thereof to the Government, he shall be deemed to be a defaulter in respect of the amount specified in the notice and all the consequences of this Act or the rules made thereunder shall follow;* *(iv) the officer issuing a notice under sub-clause (i) may, at any time, amend or revoke such notice or*	*discharged.*

Section 79(1)(c) of the Act	Rule 145 of the Rules
extend the time for making any payment in pursuance of the notice; *(v) any person making any payment in compliance with a notice issued under sub-clause (i) shall be deemed to have made the payment under the authority of the person in default and such payment being credited to the Government shall be deemed to constitute a good and sufficient discharge of the liability of such person to the person in default to the extent of the amount specified in the receipt;* *(vi) any person discharging any liability to the person in default after service on him of the notice issued under sub-clause (i) shall be personally liable to the Government to the extent of the liability discharged or to the extent of the liability of the person in default for tax, interest and penalty, whichever is less;* *(vii) where a person on whom a notice is served under sub-clause (i) proves to the satisfaction of the officer issuing the notice that the money demanded or any part thereof was not due to the person in default or that he did not hold any money for or on account of the person in default, at the time the notice was served on him, nor is the money demanded or any part thereof, likely to become due to the said person or*	

Section 79(1)(c) of the Act	*Rule 145 of the Rules*
be held for or on account of such person, nothing contained in this section shall be deemed to require the person on whom the notice has been served to pay to the Government any such money or part thereof;	

30. The figures given in the counter affidavit regarding the alleged evasion of tax liability on the strength of bogus invoice is mind-boggling and shows inherent weakness in the system and how the system is capable of being manipulated and systematically abused by unscrupulous person. The respondent has to strengthen Rules and plug the loop holes so that, such evasion and leakage of tax do not take place in future. The case laws cited by the learned counsel for the petitioner are irrelevant.

31. Even if the respondent has forced the petitioner's client to pay the tax directly into the petitioner's Electronic Liability Register, the amount has not been appropriated or debited towards tax, interest, penalty, late fee or any other amount. The amount is to be debited at a future date towards tax liability of the petitioner. Even, if the petitioner's client was asked to pay the

amount into the aforesaid Electronic Liability Register, the amount has not been debited towards any tax liability or penalty under the Act. If the amount has to be refunded, it has to be refunded in accordance with provisions of the Act.

32. Considering the fact that the respondent is investigating, the case, which commenced during the month of August-September, 2021, respondent is directed to complete investigation within a period within a period of 3 months from today and issue appropriate Show Cause Notice under Section 73 or 74 of CGST Act, 2017.

33. The amount lying in the Electronic Liability Register of the petitioner can be refunded only the manner in the law. It cannot be ordered to be refunded. It can however be utilised by the petitioner for discharging tax liability against future supplies to be made/effected by the petitioner provided of course prior to such supply, the tax to be paid by the petitioner is adjudicated and determined and appropriated in the proposed proceedings under Section 73/74 of the CGST Act, 2017, in which case, Section 79 of the CGST Act, 2017 can be pressed into service.

34. Though, it is quite possible for the petitioner to establish that the letter was obtained from the petitioner under coercion to ensure that the petitioner's client to pay the amount into the aforesaid Electronic Liability Register, it is to be decided elsewhere and not here. As the amount has not been debited and since it has not been appropriated so far, there is no scope for granting any relief to the petitioner in this writ petition. I therefore do not find any merits in the present Writ Petition. Therefore, the present Writ Petition is liable to be dismissed. I however, give liberty to the petitioner to work out an appropriate remedy under Section 54 of the CGST Act read with Chapter X of the CGST Rules.

35. In fine, the respondent is directed to issue proper Show Cause Notice to the petitioner preferably within a period of three months from the date of receipt of a copy of this order considering the fact that the present Writ Petition was filed during September, 2021.

36. The petitioner shall thereafter reply to the Show Cause Notice

within a period of three months days from the date receipt of the Show Cause Notice. This is without prejudice to the rights of the petitioner to seek for refund in accordance with law.

37. Refund of amount will be subject to the final outcome of the show cause proceedings and in accordance with Section 54 of the CGST Act read with Chapter X of the CGST Rules.

38. This Writ Petition stands dismissed with the above observations. No cost. Consequently, connected Miscellaneous Petition is closed.

4.03.2022

Index : Yes/No
Internet : Yes/No
kkd / jen

To

The Additional Director General
Directorate of GST Intelligence,
Tower-II, BSNL Building,
Greams Road, Chennai 600 006.

C.SARAVANAN,J.

kkd

Pre-delivery Order in
W.P.No.20067 of 2021
and WMP.No.21321 of 2021

4.03.2022