**IN THE HIGH COURT OF KARNATAKA AT BENGALURU**

**DATED THIS THE 30TH DAY OF SEPTEMBER, 2024**

**BEFORE**

**THE HON'BLE MR JUSTICE S.R.KRISHNA KUMAR**

**WRIT PETITION NO. 26693 OF 2024 (T-RES)**

**BETWEEN:**

M/S TRAVACORE MINERALS AND TRANSPORT
COMPANY
A PROPRIETORSHIP CONCERN
REGISTERED UNDER THE COMPANIES ACT
HAVING ITS REGISTERED OFFICE AT
SY. NO. 372/C, DASHAMAPURA VILALGE, HAGARI
BOMMANAHALLI,
BELLARI - 583212
REPRESENTED BY ITS PROPRIETOR
RIYA SHAJU NAIR
R/AT GROUND FLOOR, FLAT NO.G-2
NO.12, 2ND MAIN ROAD,
CQAL ATTUR LAYOUT, YELAHANKA,
BENGALURU - 560064.

...PETITIONER

(BY SRI. BHARATH KUMAR V.,ADVOCATE)



**AND:**

1. STATE OF KARNATAKA
   THROUGH ADDL. CHIEF SECRETARY
   REVENUE DEPARTMENT,
   GOVERNMENT OF KARNATAKA,
   VIKASA SOUDHA,
   AMBEDKAR VEEDHI,
   BENGALURU - 560001.

2. A COMMISSIONER OF COMMERCIAL TAXES(LGSTO 465)
DAVANGERE
HAVING OFFICE AT
VANIJYA THERIGE BHAVAN, A BLOCK, DEVARAJA URS
LAYOUT, DAVANGERE - 577006

…RESPONDENTS

(BY SRI. HEMA KUMAR K, AGA)

THIS WP IS FILED UNDER ARTICLES 226 AND 227 OF THE CONSTITUTION OF INDIA PRAYING TO QUASH THE ORDER DATED 9-07-2024 BEARING NO. 126/2023-24, PASSED BY THE R2 HEREIN (ANNEXURE-A); DIRECTION DECLARING THE PROVISION OF RULE 86A OF THE CENTRAL GOODS AND SERVICE TAX ACT/ STATE GOODS AND SERVICE TAX RULES, 2017 (CGST/SGST) HAS BEEN UNREASONABLE, ARBITRARY, BESIDES BEING DISCRIMINATORY AND VIOLATIVE OR ARTICLE 14 AND 19(1)(G) OF THE CONSTITUTION OF INDIA.

THIS PETITION, COMING ON FOR ORDERS, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: HON'BLE MR JUSTICE S.R.KRISHNA KUMAR

**ORAL ORDER**

In this petition, the petitioner seeks the following reliefs:

*a. Issue a writ, order or direction in the nature of certiorari or any other appropriate writ, order or direction quashing the order dated 09.07.2024 bearing No. 126/2023-24, passed by the Respondent No. 2 herein (Annexure A).*

*b. Issue a writ, order or direction in the nature of certiorari or any other appropriate writ, order or direction*

*declaring the provision of Rule 86A of the Central Goods and Service Tax Act / State Goods and Service Tax Rules, 2017 (CGST / SGST) has been unreasonable, arbitrary, besides being discriminatory and violative of Article 14 and 19(1)(g) of the Constitution of India."*

2. Heard learned counsel for the petitioner and learned counsel for the respondents and perused the material on record.

3. A perusal of the material on record will indicate that the Input Tax Credit [ITC] of the petitioner was blocked by the impugned order at Annexure - A dated 09.07.2024, by invoking Rule 86A of the Central Goods and Services Tax Rules, 2017 (for short 'the CGST Rules'). In this context, learned counsel for the petitioner invited my attention to the material on record in order to point out that before passing the impugned order, pre-decisional hearing was not provided to the petitioner nor does the impugned order contain any reason to believe as to why it was necessary to block the ITC and in view of the judgment of the Division Bench of this Court in the case of ***K-9-Enterprises Vs. State of Karnataka*** reported in ***W.A.No.100425/2023 and connected matters,*** the impugned order deserves to be quashed.

4. *Per contra*, learned counsel for respondents supports the impugned order and submit that there is no merit in the petition and the same is liable to be dismissed.

5. In ***K-9-Enterprises***'s case referred to supra, the following points were answered in favour of the petitioner-assessee by holding as under:

> *"8.13 In view of the aforesaid discussion, we are of the considered opinion that the learned Single Judge clearly fell in error in coming to the conclusion that a pre-decisional hearing was not required to have been provided/granted to the appellants by the respondents-revenue prior to passing the impugned orders blocking the ECL of the appellants and consequently, the said findings recorded by the learned Single Judge deserve to be set aside.*
>
> 9. *The next point that arises for consideration is as to whether the respondents-revenue were justified in passing the impugned orders blocking the Electronic Credit Ledgers of the appellants by invoking Rule 86A of the CGST Rules which mandates that the respondents-revenue should have 'reasons to believe' that the ITC available in the ECL was fraudulently availed or was ineligible as contemplated in the said provision; in this regard, the learned Single Judge*

*noticed that 2 pre-requisites/conditions had to be satisfied/fulfilled before invocation of Rule 86A and blocking the ECL of the appellants and held as under:*

> *18. The first requisite of the Rule which is required to be considered by the competent authority is with regard to the basis of material available before he taking any action for blocking of electronic credit ledger. The second pre-requisite is of recording the reasons in writing for invoking the powers under Rule 86A of the Rules of 2017. Unless the aforesaid two pre-requisites are fulfilled, the competent authority cannot invoke the powers under Rule 86A of the Rules of 2017 for the purpose of disallowing the debit of the determined amount to the electronic credit ledger or to block the electronic credit ledger even to the extent of amount fraudulently or wrongly availed by the petitioners/assessee*.

*9.1 However, the learned Single Judge came to the erroneous conclusion that the respondents-revenue had fulfilled/satisfied the aforesaid twin/dual pre-requisites/requirements viz., respondents had 'reasons to believe' which were based on cogent material available with them to invoke Rule 86A of the CGST Rules; in this context, the learned Single Judge failed to appreciate that the only 'reason to believe' was alleged satisfaction of certain officers who conducted a field visit in Goa and noticed that the said suppliers were not in business. It is well settled that the expression 'reason to believe' would necessarily mean that the respondents must arrive at a satisfaction based on their own*

*independent inquiry and not upon borrowed inquiry as has been done in the instant case.*

*9.2 The learned Single Judge also failed to appreciate that Rule 86A was drastic and draconian in nature warranting existence of "reasons to believe" before exercising the said power by strictly complying with all the conditions / requirements of the said provision; further, an order blocking the ECL by invoking Rule 86A cannot be passed merely based on investigation reports and without any application of mind and that the onus was on the respondents – revenue to show that the appellants had deliberately availed fraudulent or ineligible ITC; in the instant case, the ECL of the appellants had been blocked by the respondents without verifying the genuineness of the transaction and a bonafide purchaser cannot be denied ITC on account of a supplier's default and the recipient cannot be made to suffer denial of ITC for the wrong doings of the supplier; so also, blocking of ECL would defeat the principles and purpose of value added tax and would lead to a cascading effect thereby resulting in irreparable injury and hardship to the appellants especially when ITC was a valuable right which cannot be confiscated in a manner opposed to law.*

*9.3 The learned Single Judge also failed to appreciate that the procedure prescribing the requirements for blocking ECL has been explained by*

*the respondents themselves in the CBEC Circular dated 02.11.2021, the relevant portions are as under:*

> *3.1.2 Perusal of the rule makes it clear that the Commissioner, or an officer authorised by him, not below the rank of Assistant Commissioner, must have "reasons to believe" that credit of input tax available in the electronic credit ledger is either ineligible or has been fraudulently availed by the registered person, before disallowing the debit of amount from electronic credit ledger of the said registered person under rule 86A. The reasons for such belief must be based only on one or more of the following grounds:*
>
> *a) The credit is availed by the registered person on the invoices or debit notes issued by a supplier, who is found to be non-existent or is found not to be conducting any business from the place declared in registration.*
>
> *b) The credit is availed by the registered person on invoices or debit notes, without actually receiving any goods or services or both.*
>
> *c) The credit is availed by the registered person on invoices or debit notes, the tax in respect of which has not been paid to the government.*
>
> *d) The registered person claiming the credit is found to be non-existent or is found not to be conducting any business from the place declared in registration.*

*e) The credit is availed by the registered person without having any invoice or debit note or any other valid document for it.*

*3.1.3 The Commissioner, or an officer authorised by him, not below the rank of Assistant Commissioner, must form an opinion for disallowing debit of an amount from electronic credit ledger in respect of a registered person, only after proper application of mind considering all the facts of the case, including the nature of prima facie fraudulently availed or ineligible input tax credit and whether the same is covered under the grounds mentioned in sub-rule (1) of rule 86A, as discussed in para 3.1.2 above; the amount of input tax credit involved; and whether disallowing such debit of electronic credit ledger of a person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue.*

*3.1.4 It is reiterated that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case(s) fit for exercising power under rule 86A.The remedy of disallowing debit of amount from electronic credit ledger being, by its very nature, extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and*

*evaluation as distinguished from a purely subjective consideration of suspicion. The reasons are to be on the basis of material evidence available or gathered in relation to fraudulent availment of input tax credit or ineligible input tax credit availed as per the conditions/ grounds under sub-rule (1) of rule 86A.*

*3.3.1 The amount of fraudulently availed or ineligible input tax credit availed by the registered person, as per the grounds mentioned in sub-rule (1) of rule 86A, shall be prima facie ascertained based on material evidence available or gathered on record. It is advised that the powers under rule 86A to disallow debit of the amount from electronic credit ledger of the registered person may be exercised by the Commissioner or the officer authorized by him, as per the monetary limits detailed in Para 3.2.1 above. The officer should apply his mind as to whether there are reasons to believe that the input tax credit availed by the registered person has either been fraudulently availed or is ineligible, as per conditions/ grounds mentioned in sub-rule (1) of rule 86A and whether disallowing such debit of electronic credit ledger of the said person is necessary for restricting him from utilizing/ passing on fraudulently availed or ineligible input tax credit to protect the interests of revenue. Such "Reasons to believe" shall be duly recorded by the concerned officer in writing on file, before he proceeds to disallow debit*

*of amount from electronic credit ledger of the said person.*

*9.4 It is clear from the aforesaid CBIC Circular that the respondents-revenue must form an opinion for disallowing debit of an amount from electronic credit ledger in respect of a registered person, only after proper application of mind considering all the facts of the case, including the nature of prima facie fraudulently availed or ineligible input tax credit and whether the same is covered under the grounds mentioned in Rule 86A(1). As stated earlier, Rule 86A, which in effect is the power to block ECL is drastic in nature which creates a disability for the taxpayer to avail of the credit in ECL for discharge of his tax liability which he is otherwise entitled to avail and therefore, all the requirements of Rule 86A would have to be fully complied with before the power there under is exercised; when this Rule requires arriving at a subjective satisfaction which is evident from the use of words, "must have reasons to believe", the satisfaction must be reached on the basis of some objective material available before the authority and cannot be made on the flights of ones fancies or whims or caprices.*

*9.5 In the instant case, the electronic credit ledgers have been blocked solely on the basis of communication from another officer [Field visit report by*

*the Asst. State Tax Officer, Vasco-D-Gama, (Goa)]. There was no tangible material to form any belief that the ITC lying in the appellants' ECL was on account of any fake invoice; it had proceeded to take action solely on the basis of a direction issued by another authority. Before the drastic measure to block a taxpayer's ECL is taken, it was necessary for the concerned officer to have some material to form a belief that the conditions under Rule 86A are satisfied by making an independent analysis before such action is taken and even this aspect has not been considered or appreciated by the learned Single Judge while passing the impugned order, which deserves to be set aside on this ground also.*

*9.6 The learned Single Judge also did not appreciate that the power of disallowing debit of amount from electronic credit ledger must not be exercised in a mechanical manner and careful examination of all the facts of the case is important to determine case(s) fit for exercising power under Rule 86A. The remedy of disallowing debit of amount from electronic credit ledger being by its very nature extraordinary, has to be resorted to with utmost circumspection and with maximum care and caution. It contemplates an objective determination based on intelligent care and evaluation as distinguished from a purely subjective consideration of suspicion. The reasons are to be on the basis of*

*material evidence available or gathered in relation to fraudulent availment of input tax credit or ineligible input tax credit availed as per the conditions/grounds in Rule 86A.*

*9.7 A perusal of the impugned orders will indicate that the same have been passed based on the communication received from other officers, without any independent application of mind. This shows that exercise of power under Rule 86A was not because he was independently satisfied about the need for blocking the ECL but, was due to the fact that he felt compelled to obey the command of another officer. This is not the manner in which the law expects the power under rule 86A to be exercised. When a thing is directed to be done in a particular manner, it must be done in that manner or not at all is the well-established principle of administrative law. On a perusal of the impugned orders, it is crystal clear that the order to block the ECL provisionally was out of the borrowed satisfaction of the respondent authorities rather than based on any independent analysis.*

*9.8 As stated supra, the impugned order discloses that the same has been passed mechanically and is based on borrowed satisfaction and does not meet the test of formation of an opinion of the Assessing Officer who seems to have been influenced by the findings of the Investigation Wing [i.e, Field visit report*

*by the Asst. State Tax Officer, Vasco-D-Gama, (Goa)] and have not independently formed an opinion on the likely additions to be made during assessment proceedings. In the light of existence of a legal mandatory pre-requirement and precondition of recording of formation of opinion which is in pari-materia with "reasons to believe", it was incumbent upon the officer to arrive at his own satisfaction and not borrowed satisfaction by proper application of mind; the respondents have proceeded solely on the basis that the supplier has been found to be non-existent or not to be conducting any business from the place which it has obtained registration, has blocked the input tax which is impermissible in law without checking the genuineness or otherwise of the transaction and consequently, the impugned orders are bald, vague, cryptic, laconic, unreasoned and non-speaking and deserve to be set aside.*

*9.9 While dealing with the provisions of the CGST Act, this Court in* ***Xiaomi's case supra,*** *wherein one of us speaking for the Court held as under:*

> *10. A perusal of the impugned order will indicate that except for stating that there is likely addition of the amount mentioned in the order, no reasons, much less valid or cogent reasons are assigned by the 1st respondent as to how and why he has formed an opinion that it was necessary to provisionally attach the fixed deposits of the petitioner for the purpose of protecting the interest of the revenue. The requirements and parameters preceding passing of a provisional attachment order*

*came up for consideration before the Apex Court in the case of Radha Krishan Industries' case (supra), wherein it was held as under:-*

*48. On the other hand, when the proper officer is of the opinion that the amount which has been paid under sub-section (5) falls short of the amount which is actually payable, a notice under sub-section (1) is to issue for the amount which falls short of what is actually payable. Sub-section (8) contains a stipulation that where a person who is chargeable with tax under sub-section (1) pays the tax together with interest and a penalty of twenty-five per cent of the tax within thirty days of the issuance of the notice, all proceedings in respect of the notice shall be deemed to be concluded. Under sub-section (9), the proper officer after considering the representation of the person chargeable to tax is authorised to determine the amount of tax, interest and penalty due and to issue an order. A period of five years is stipulated by sub-section (10) for the issuance of an order in sub-section (9). Sub-section (11) stipulates that upon service of an order under subsection (9), all proceedings in respect of the notice shall be deemed to be concluded upon the person paying the tax with interest under Section 50 and a penalty equivalent to 50 per cent of the tax within thirty days of the communication of an order. These provisions indicate how sub-sections (5), (8) and (11) operate at different stages of the process.*

*49. Now in this backdrop, it becomes necessary to emphasise that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in*

*Section 83 is, in other words, at a stage which is anterior to the finalisation of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory preconditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.*

*50. By utilising the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorised not merely because it is expedient to do so (or profitable or practicable for the Revenue to do so) but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the Revenue can be protected only by a provisional attachment without which the interest of the Revenue would stand defeated. Necessity in other*

*words postulates a more stringent requirement than a mere expediency. A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallised. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules.The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assessee can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorise Commissioners to make pre-emptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue.*

*51. These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement. While dealing with a similar provision contained in Section 45 [ Section 45 (1) provides as follows:*

***"45. Provisional attachment.-(1)** Where during the tendency of any proceedings of*

*assessment or reassessment of turnover escaping assessment, 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 belonging to the dealer in such manner as may be prescribed."] of the Gujarat Value Added Tax Act, 2003, one of us (Hon'ble M.R. Shah, J.) speaking for a Division Bench of the Gujarat High Court in* ***Vishwanath Realtor v. State of Gujarat [Vishwanath Realtor v. State of Gujarat, 2015 SCC OnLine Guj 6564]*** *observed : (Vishwanath Realtor case [****Vishwanath Realtor v. State of Gujarat, 2015 SCC OnLine Guj 6564] , SCC OnLine Guj para 26****)*

*"26. Section 45 of the VAT Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer. However, such satisfaction must be on some tangible material on objective facts with the Commissioner. In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any order is passed against the dealer under the VAT Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount*

*thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under Section 45 of the VAT Act."*

*72. It is evident from the facts noted above that the order of provisional attachment was passed before the proceedings against the appellant were initiated under Section 74 of the Hpgst Act. Section 83 of the Act requires that there must be pendency of proceedings under the relevant provisions mentioned above against the taxable person whose property is sought to be attached. We are unable to accept the contention of the respondent that merely because proceedings were pending/concluded against another taxable entity, that is, GM Powertech, the powers of Section 83 could also be attracted against the appellant. This interpretation would be an expansion of a draconian power such as that contained in Section 83, which must necessarily be interpreted restrictively. Given that there were no pending proceedings against the appellant, the mere fact that proceedings under Section 74 had concluded against GM Powertech, would not satisfy the requirements of Section 83. Thus, the order of provisional attachment was ultra vires Section 83 of the Act.*

*73. On 1-3-2021, the appellant has filed an appeal under Section 107 together with a deposit of Rs 32,15,488 representing ten per cent of the tax due. Section 107(6) contains the following stipulation:*

*"107. (6) No appeal shall be filed under sub-section (1), unless the appellant has paid-*

*(a) in full, such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order, as is admitted by him; and*

*(b) a sum equal to ten per cent of the remaining amount of tax in dispute arising from the said order, in relation to which the appeal has been filed."*

*Sub-section (7) stipulates that:*

*"107. (7) Where the appellant has paid the amount under sub-section (6), the recovery proceedings for the balance amount shall be deemed to be stayed."*

*74. Clause (a) of sub-section (6) provides that no appeal shall be filed without the payment in full, of such part of the amount of tax, interest, fine, fee and penalty arising from the impugned order as is admitted. In addition, under clause (b), ten per cent of the remaining amount of tax in dispute arising from the order has to be paid in relation to which the appeal has been filed. Upon the payment of the amount under sub-section (6) the recovery proceedings for the balance are deemed to be stayed. Thus, in any event, the order of provisional attachment must cease to subsist. The appellant, having filed an appeal under Section 107, is required to comply with the provisions of sub-section (6) of Section 107 while the recovery of the balance is deemed to be stayed under the provisions of sub-section (7). As observed hereinabove and under Section 83, the order of provisional attachment may be passed during the pendency of any proceedings under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74. Therefore, once the final order of assessment is passed under Section 74 the order of provisional attachment must cease to subsist. Therefore, after the final order under Section 74 of the Hpgst Act was passed on 18-2-2021, the order of provisional attachment must come to an end.*

*11. The said judgment which was passed while dealing with identical provisions under the CGST Act, 2017 and Rules made there under was followed by this Court in the context of Section 281B of the I.T. Act by this Court in* ***Indian Minerals Case (supra),*** *wherein it was held as under:-*

*"8. As held by the Apex Court in the aforesaid decision, mere apprehension on the part of the respondents that huge tax demands are likely to be*

*raised on completion of assessment is not sufficient for the purpose of passing a provisional order of attachment. It has also been held that apart from the fact that a writ petition under Article 226 of the Constitution of India challenging the provisional attachment order was maintainable, having regard to the fact that the provisional attachment order of a property of a taxable person including the bank account of such person is draconian in nature and the conditions which are prescribed by the statute for the valid exercise of power must be strictly fulfilled, the exercise of power for order of provisional attachment must necessarily be preceded by formation of an opinion by the authorities that it is necessary to do so for the purpose of protecting the interest of Government revenue. Before the order of provisional attachment, the Commissioner must form an opinion on the basis of the tangible material available for attachment that the assessee is not likely to fulfil the demand payment of tax and it is therefore necessary to do so for the purpose of protecting the interest of the Government revenue. In addition to the aforesaid mandatory requirements, before passing the provisional attachment order, it is also incumbent upon the authorities to come to a conclusion based on the tangible material that without attaching the provisional attachment, it is not possible in the facts of the given case to protect the revenue and that the provisional attachment order is completely warranted for the purpose of protecting the Government revenue.*

*9. Applying the principles laid down in Radha Krishan's case (supra) to the facts of the instant case, a perusal of the impugned provisional attachment order will clearly indicate that except for merely stating that since there is a likelihood of huge tax payments to be raised on completion of assessment and that for the purpose of protecting the revenue, it is necessary to provisionally attach the fixed deposit of the petitioners, the other mandatory requirements and pre-condition as laid down by the Apex Court have neither been complied with nor fulfilled or followed prior to passing the*

*impugned order. It is apparent that the impugned provisional attachment orders at Annexures-D, D1, D2 and D3 do not satisfy the legal requirements as laid down in Radha Krishan's case (supra) and consequently, in view of the fact that the impugned provisional orders are cryptic, unreasoned, non-speaking and laconic, the same deserve to be quashed.*

*10. Insofar as the apprehension of the respondents that in the event huge tax payments are to be raised as against the petitioners – assessee, the assessee may not make payment of the same causing loss to the revenue is concerned, in the light of the undisputed fact that the proceedings under Section 153A of the said Act of 1961 have already been initiated coupled with the fact that Section 281 of the said Act of 1961, contemplates that any alienation of any property belonging to the petitioners would be null and void, in addition to the specific assertion made by the petitioner that they own and possess immovable property to the tune of more than Rs.300 crores, the said apprehension of the respondents is clearly unfounded and without any basis and consequently, the said apprehension of the respondents cannot be accepted".*

*12. In the instant case, a perusal of the impugned order will clearly indicate that the same is arbitrary and reflects premeditated conclusion without recording either an opinion or necessary to attach the property; the doctrine of proportionality which is implicated in the purpose and necessity of provisional attachment mandates the existence of a proximate or a live link between the need for the attachment and the purpose which it is intended to secure.*

*13. Further, mere apprehension that huge tax demands are likely to be raised on completion of assessment is not sufficient for the purpose of passing a provisional attachment order and the exercise of the same must necessarily be preceded*

*by the formation of an opinion that it was necessary to do so for the purpose of protecting the interest of Government revenue, that too on the basis of tangible material that the petitioner was not likely to fulfil the demand and on the other hand, was likely to defeat the demand, which is conspicuously missing and absent in the impugned order.*

*14. The impugned order also discloses that the same has been passed mechanically and is based on borrowed satisfaction and does not meet the test of formation of an opinion of the Assessing Officer who seems to have been influenced by the findings of the Investigation Wing and TPO and have not independently formed an opinion on the likely additions to be made during assessment proceedings.*

*15. As stated supra, in the light of existence of a legal mandatory pre-requirement and precondition of recording of formation of opinion which is in pari materia with "reasons to believe" in Section 281B of the I.T.Act, it was incumbent upon the 1st respondent to arrive at his own satisfaction and not borrowed satisfaction by proper application of mind and consequently, the impugned order which is bald, vague, cryptic, laconic, unreasoned and non-speaking order deserves to be set aside, particularly having regard the undisputed fact that except for stating that he was of the opinion that it was necessary to attach the fixed deposits for the purpose of protecting the interest of the revenue, no other reasons have been assigned by the 1st respondent in the impugned order.*

*16. A perusal of the impugned order will also indicate that there is no finding recorded as to why a provisional order of attachment had to be passed against the petitioner; it is significant to note that there is no finding recorded by the 1st respondent that the petitioner was a 'fly by night operator' from whom it was not possible to recover the likely demand. The impugned order also does not state that the petitioner was either a habitual defaulter nor that he was not doing any business at all or that the*

> *petitioner did not have sufficient funds to satisfy the demand. In other words, in the absence of any reasons as to why and how the demand would be defeated by the petitioner, mere apprehension that huge tax demands are likely to be raised on completion of assessment was not sufficient to constitute formation of opinion and existence of proximate and live link for the purpose and necessity of provisional attachment which implicate the doctrine of proportionality. Under these circumstances also, I am of the considered opinion that the impugned order deserves to be quashed.*

*9.10 On perusal of the entire material on record, we are satisfied that the said independent arrival of opinion that there was a reason to believe is not found forthcoming from the order issued blocking the said credit and it is entirely based on the satisfaction of another officer; it is quite possible that the transaction, when entered into in 2017 or 2018 could be genuine and when the officer visits in 2020 or 2021, the business could have been closed and therefore the mere closure of business in 2020 or 2021 cannot be a basis for denying credit availed earlier. All these factors required that the respondents-revenue ought to have carefully considered and verified all aspects before taking such a drastic action of blocking credit under Rule 86A which is yet another circumstance that would vitiate the impugned order.*

*9.11 The aforesaid facts and circumstances are sufficient to come to the unmistakable conclusion that in*

*the absence of valid nor sufficient material which constituted 'reasons to believe' which was available with respondents, the mandatory requirements/pre-requisites/ingredients/parameters contained in Rule 86A had not been fulfilled/satisfied by the respondents-revenue who were clearly not entitled to place reliance upon borrowed satisfaction of another officer and pass the impugned orders illegally and arbitrarily blocking the ECL of the appellant by invoking Rule 86A which is not only contrary to law but also the material on record and consequently, the impugned orders deserve to be quashed.*

***Point No.2** is also accordingly answered in favour of the appellants by holding that the respondents-revenue committed a grave and serious error/illegality/infirmity in passing the impugned orders blocking the Electronic Credit Ledgers of the Appellants by invoking Rule 86A of the CGST Rules."*

6. In view of the aforesaid dictum of the Hon'ble Division Bench of this Court, I am of the considered opinion that in the instant case, since no pre-decisional hearing was provided/granted by the respondents before passing the impugned order, coupled with the fact that the impugned order invoking Section 86A of the CGST Rules by blocking of the ITC of the petitioner does not

contain independent or cogent reasons to believe except by placing reliance upon the reports of Enforcement authority which is impermissible in law, since the same is on borrowed satisfaction as held by the Hon'ble Division Bench of this Court, the impugned order deserves to be quashed.

7. It is also pertinent to note that in the impugned order except stating that *"a registered person/s* who has been found *non-existent or not to be conducting any business from any place for which registration has been obtained in contravention of the above provisions",* no other reasons are forthcoming in the impugned order. On this ground also, the impugned order dated 09.07.2024 deserves to the quashed.

8. In the result, I pass the following:

**ORDER**

(i) The petition is hereby ***allowed***.

(ii) Impugned order dated 09.07.2024 at Annexure-A is hereby quashed.

(iii) The concerned respondents are directed to unblock the ITC of the petitioner immediately upon

the receipt of copy of this order, so as to enable the petitioner to file returns forthwith.

(iv) Liberty is reserved in favour of the respondents to proceed against the petitioner in accordance with law and in terms of the judgment of Division Bench in ***K-9-Enterprises Vs. State of Karnataka*** reported in ***W.A.No.100425/2023 and connected matters***.

Sd/-
**(S.R.KRISHNA KUMAR)**
**JUDGE**

RB