

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**R/SPECIAL CIVIL APPLICATION NO. 14129 of 2019**=====
ENPROCON ENTERPRISE LTD.**Versus****THE ASSISTANT COMMISSIONER OF STATE TAX**
=====

Appearance:

MR RAVISH D BHATT(5867) for the Petitioner(s) No. 1

for the Respondent(s) No. 2

MR SOAHAM JOSHI, AGP (1) for the Respondent(s) No. 1,2,4

MR NIRZAR S DESAI(2117) for the Respondent(s) No. 3
=====

CORAM: HONOURABLE MR.JUSTICE J.B.PARDIWALA**and****HONOURABLE MR. JUSTICE BHARGAV D. KARIA****Date : 08/01/2020****ORAL ORDER****(PER : HONOURABLE MR.JUSTICE J.B.PARDIWALA)**

1. By this Writ Application, under Article 226 of the Constitution of India, the writ applicant has prayed for the following reliefs:

"(A) Your Lordship may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction inter alia quashing and setting aside the warrant of authorisation issued under Section 67(2) of the CGST Act, 2017, seizure conducted by the respondents pursuant to search operation initiated on 29.07.2019 and subsequent proceedings / enquiry conducted in pursuance of the search and seizure operation initiated on 29.07.2019, in the interest of justice;

(B) Your Lordship may be pleased to issue a writ of mandamus, or any other appropriate writ, order or direction to the respondents inter alia

directing the respondents to return the seized material back to the applicant, in the interest of justice;

(C) Your Lordship may be pleased to further quash and set aside the provisional attachment orders at **Annexure 'A' (Colly)** issued purportedly u/s. 83 of the CGST Act, 2017, in connection with the bank accounts of the applicant and the office premises of the applicant respectively issued to the Branch Manager, HL Commerce College Branch, Central Bank of India, Branch Manager, Naranpura Branch, ICICI Bank, Branch Manager, Vijaya Bank, Ashram Road Branch and City Survey Superintendent, Paldi, Ahmedabad, in the interest of justice;

(D) Your Lordship may be pleased to issue a writ of prohibition or any other appropriate writ, order or direction inter alia quashing the undated show cause notice issued on 01.08.2019 (**Annexure B**) purportedly issued u/s. 74 of CGST Act, 2017, in the interest of justice.

(E) Your Lordship may be pleased to issue a writ of mandamus or any other appropriate writ, order or direction inter alia quashing the order of prohibition dated 30.07.2019 (**Annexure C**) passed under rule 139(4) of the CGST Rules, 2017, in the interest of justice.

(F) Pending admission, hearing and final disposal of this application, Your Lordship may be pleased to stay the execution, implementation and operation of the provisional attachment orders as annexed hereto at **Annexure A Colly.**, passed purportedly u/s. 83 of the CGST Act, 2017, in the interest of justice.

(G) Pending admission, hearing and final disposal of this application, Your Lordship may be pleased to stay the execution, implementation and operation of order of prohibition dated 30.07.2019 (**Annexure C**) passed under rule 139(4) of CGST Rules, 2017,

in the interest of justice.

(H) Your Lordship may be pleased to pass such other and further orders as may be deemed just, fit and proper in the facts and circumstances of the case, in the end of justice."

2. The facts, giving rise to this Writ Application, may be summarized as under:

2.1. The writ applicant is a company, incorporated under the provisions of the Companies Act, 1956. It is engaged in the business of laying of pipelines, works contract, renting the machinery and sale of old machinery and scrap material, etc.

2.2. The writ applicant is a company registered under the provisions of the Gujarat Goods and Services Tax Act, 2017 (for short 'the GGST Act, 2017').

2.3. It appears that the office premises of the writ applicant situated at Ahmedabad and Baroda were raided by the respondent-Authorities, in exercise of their powers, under Section 67 of the CGST Act, 2017. In other words, search and seizure was undertaken by the Authorities some time in the months of March and April, 2019. It also appears that the proceedings under Section 73 of the GGST Act, 2017, have been initiated against the writ applicant.

2.4. It further appears that later an order of provisional attachment of the immovable property situated at B-705, Mondeal Heights, near Wide Angle, S.G.Highway, Ahmedabad, came to be passed by the

Assistant Commissioner of State Tax in exercise of powers, under Section 83 of the Act, 2017.

2.5. Being dissatisfied with the order of provisional attachment, the writ applicant is here before this Court, with the present Writ Application.

3. On 20th September, 2019, a Co-ordinate Bench of this Court, passed the following order:

"1. Mr. Ravish Bhatt learned Advocate for the petitioner has inter alia invited the attention of the court to the order of prohibition dated 30.7.2019 passed by the Assistant Commissioner of State Tax under rule 139(4) of the Gujarat Goods and Service Tax, 2017 (hereinafter referred to as 'GGST Act, 2017') to submit that such order is beyond the scope of the provisions of sub-section (2) of section 67 of the GGST Act, 2017.

2. It is further submitted that the respondents have exercised powers of provisional attachment of property under section 83 of the GGST Act whereby, the three bank accounts of the petitioner maintained with the Central Bank of India, H.L. Commerce College Branch, Ahmedabad, ICICI Bank, Naranpura Branch, Ahmedabad and Vijaya Bank, Ashram Road Branch, Ahmedabad have been attached.

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3. It was submitted that apart from the attachment of the bank accounts, the respondents have also provisionally attached the office premises of the petitioner being B-705, Mondeal Heights. It was submitted that the immovable property which has been attached by the respondents is worth more than a crore rupees, which is more than the amount estimated by the respondents, which may become due and payable in case an assessment order is passed against the petitioner. It was submitted that therefore, there is no justification for attaching the

bank accounts over and above the attachment of the office premises when the liability that may arise is already protected by the attachment over the office premises.

4. This court has also heard Ms. Maithili Mehta learned Assistant Government Pleader for the respondents.

5. On a perusal of the order dated 30.7.2019 passed by the Assistant Commissioner of State Tax, Unit 22, Ahmedabad under rule 139(4) of the GGST Rules, pursuant to the search of the premises of the petitioner under sub-section (2) of section 67 of the GGST Act, 2017, it is evident that the properties in respect of which the prohibition order has been passed were not found at the premises which came to be searched.

6. Under the circumstances, the attachment of such property appears to be beyond the scope of the powers of the concerned Officer under subsection(2) of section 67 of the Act.

7. In the aforesaid premises, issue rule, returnable on 10.10.2019. Ms. Maithili Mehta learned Assistant Government Pleader waives service of notice of rule on behalf of the respondent Nos.1, 2 and 4 and Mr. Nirzar Desai learned Senior Standing Counsel waives service of notice of rule on behalf of respondent No.3.

8. In the meanwhile by way of interim relief, the order dated 30.7.2019 issued under rule 139(4) of the GGST Rules as well as the attachment of the above-referred three bank accounts of the petitioner under section 83 of the GGST Act, 2017, are hereby stayed.

9. Direct service is permitted, today."

4. Having heard the learned counsel appearing for the parties and having gone through the materials on

record, the only question that falls for our consideration, is whether the order of provisional attachment passed by the Assistant Commissioner in exercise of powers under Section 83 of the GGST Act, 2017, is sustainable in law.

5. The issue is no longer *res integra*, in view of the decision of this Court rendered on 28th August, 2019, in the case of **Valerius Industries Versus Union of India** [Special Civil Application No.13132 of 2019]. A Co-ordinate Bench of this Court, to which one of us, Mr.J.B.Pardiwala, J., is a party had the occasion to consider two questions, (i) the power of Commissioner of State Tax to delegate his powers under Section 83 of the Act to the Assistant Commissioner, and (ii) assuming for the moment that it is permissible for the Commissioner to delegate his powers to the Assistant Commissioner, what is expected of the Assistant Commissioner while exercising his delegated powers under Section 83 of the Act, for the purpose of provisional attachment. We may quote the relevant observations, made in the judgment referred to above as under:

"15. Section 83 of the Act, 2017, which is relevant for our purpose, reads as under:

"83. Provisional attachment to protect revenue in certain cases.

(1)Where during the pendency of any proceedings under section 62 or section 63

or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of the order made under subsection (1)."

16. The plain reading of Section 83 of the Act referred to above makes it clear that the powers have been conferred by the legislature upon the Commissioner. The subjective satisfaction that for the purpose of protecting the interest of the government revenue, it is necessary that the goods should be provisionally attached should be that of the Commissioner. The Commissioner has been conferred with the power to pass an order in writing for the purpose of attaching provisionally any property including the bank account belonging to the taxable person. Indisputably, in the case on hand, the order of provisional attachment of the bank account as well as the goods has not been passed by the Commissioner, the same has been passed by the State Tax Officer I.e. the respondent No.3 herein.

17. The order of provisional attachment of property under Section 83 in form NO.GST DRC22 in accordance with Rule 159(1) of the Rules reads as follows:

FORM GST DRC - 22

[See rule 159(1)]

Reference NO.AC/U44/STO1/Valerius/2018-19
dated : 20/11/2018

To,
The Manager
Bank of Baroda
Alkapuri Branch
Vadodara

*Provisional attachment of property under
Section 83*

It is to inform that M/s. Valerius Industries, having principal place of business at 26/1 GIDC Industrial Estate bearing registration number as 24AANFV4191N12H (GSTIN/ID), PAN: AANFV4191N is a registered taxable person under the Gujarat Goods and Services Tax Act 2017 & Central Goods and Services tax Act 2017. Proceedings have been launched against the aforesaid taxable person under section 67 of the said Act to determine the tax or any other amount due from the said person.

As per information available with the department, it has come to my notice that the said person has Current Account No 01880200001055 FD RD & CC Account No.01880500000081 account in your bank. In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, R R Bhatiya, State Tax Officer 1, Unit44, Vadodara, hereby provisionally attach the aforesaid account / property.

No debit shall be allowed to be made from the said account or any other account operated by the aforesaid person on the same PAN without the prior permission of this department. The property mentioned above shall not be allowed to be disposed of without the prior permission of this department.

Sd/-

(R.R. Bhatiya)

State Tax Officer 1,
Unit 44, Vadodara."

18. The order of provisional attachment of the goods valued at Rs.1,60,00,000/reads as under:

"Details of goods seized:

M/s Valerius Industries 26/1 G.I.D.C.
Industrial Estate, Kalol, Dist:
Panchmahal GSTN:24AANFV4191N1ZH

The process of site inspection was held at your business premises from 20/11/18. In this connection, it has come to the notice during this inspection and the site inspection of the business premises of the other dealers conducted by the concerned officers that, out of the purchases shown in the books of accounts by you, following dealers have been prima facie found to be engaged only in the billing activity.

STATEMENT OF PURCHASE SHOWN IN BOOKS WITHOUT TAKING PHYSICAL DELIVERY OF GOODS.

S R N O	TAX PAYER NAME	GST NO.	TOTAL VALUE OF PURCHASES SHOWN	CGST + SGST
1	ADIDEV ENTERPRISE	24HEGPS2435C1 ZN	6488624	1167954
2	LAXMIRAJ ENTERPRISE	24GTXP2601K1 Z3	14284362	2571183
3	RADHESH TRADERS	24DFNPP9188F1 ZR	3387911	609823
4	RAGHAV TRADERS	24APHPY6226N1 Z8	17975638	3235614
TOTAL			42136534	7584575

Thus, the tax credit of purchases made by you from the above mentioned dealers is liable to be rejected and tax, interest and penalty are liable to be levied. For the security of the government tax, you have to maintain goods stock of Rs.1,60,00,000/against the proposed dues from the spot goods stock of Rs.2,48,59,485 as produced by you during the site inspection. The said stock of goods has been provisionally attached.

Place:Kalo

Date:27/11/2018

Sd/-
(R.R.Bhatiya)
State Tax Officer-
Unit-6,Vadodara"

19. We shall now look into the order passed by the Commissioner of State Tax delegating his power of provisional attachment under Section 83 of the Act to : (1) Deputy Commissioner (2) Assistant Commissioner and (3) State Tax Officer. The order reads as under:

ORDER

By the Commissioner of State Tax,
Gujarat State, Ahmedabad

Dated the 15 January, 2018

No.GSL/S.5(1)/S.83/B.14

Specification of proper officers under the Gujarat Goods and Services Tax Act, 2017

In exercise of the power conferred upon me by subsection of section 5 read with clause (91) of section 2 of the Gujarat Goods and Services Tax Act, 2017 and the rules framed thereunder, I do hereby assign the functions to be performed under this Act by a proper

officer as defined in clause (91) of section 2 under different sections of the said Act mentioned in the entry in column (2) of the Schedule below and described in the corresponding entry at column (3) of the said Schedule to the Proper Officers specified in the corresponding entry in column (4) thereof, subject to the condition that the functions hereby assigned shall be performed only within their jurisdiction unless specific jurisdiction is mentioned there against.

SCHEDULE-A

SI No.	Section	Functions assigned	Designation of proper officer
'(1)	'(2)	'(3)	'(4)
1	83	Provisional attachment to protect revenue in certain cases	Deputy Commissioner, Assistant Commissioner, State Tax Officer

Sd/-

(P D Vaghela)

Commissioner of State Tax
Gujarat State, Ahmedabad."

20. The first and the foremost question that needs to be answered is whether the Commissioner could have delegated his power by virtue of the aforesaid order. Ms. Mehta, the learned A.G.P. Seeks to rely upon Section 5 of the Act, 2017. Section 5 of the State GST Act reads as under:

"5. Powers of Officers

(1) Subject to such conditions and limitations as the Commissioner may impose, an officer of State tax may exercise the powers and discharge the duties conferred or

imposed on him under this Act and discharge the duties conferred or imposed on him under this Act.

(2)An Officer of State tax may exercise the powers and discharge the duties conferred or imposed under this Act on any other Officer of State tax who is subordinate to him.

(3)The Commissioner may, subject to such conditions and limitations as may be specified in this behalf by him, delegate his powers to any other Officer who is subordinate to him.

(4)Notwithstanding anything contained in this section, an Appellate Authority shall not exercise the powers and discharge the duties conferred or imposed on any other Officer of State tax."

21. According to Ms. Mehta, by virtue of Section 5(3) of the Act, the Commissioner is empowered to delegate his power to any other officer who is subordinate to him.

22. Ms. Mehta, thereafter, invited the attention of this Court to two definitions of "Commissioner" and "Commissioner in the Board" as defined under Sections 2(24) and 2(25) respectively of the Gujarat Goods and Services Tax Act, 2017. The two definitions read as under:

"2(24). Commissioner" means the Commissioner of State tax appointed under section 3 and includes the Chief Commissioner or Principal Commissioner of State tax appointed under section 3;"

"2(25). "Commissioner in the Board" means the Commissioner referred to in section 168 of the Central Goods and Services Tax Act;"

23. Ms. Mehta, thereafter, invited the attention of this Court to Section 167

of the Gujarat Goods and Services Tax Act, 2017 (fort short, 'the GGST Act, 2017), which is with regard to the delegation of powers. Section 167 of the GGST Act, 2017 reads as under:

"The Commissioner may, by notification, direct that subject to such conditions, if any, as may be specified in the notification, any power exercisable by any authority or officer under this Act may be exercisable also by another authority or officer as may be specified in such notification."

24. In the last, Ms. Mehta invited the attention of this Court to Section 168 of the GGST 2017. Section 168 of the GGST, 2017 reads as under:

"168. Power to issue instructions or directions. The Commissioner may, if he considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the State tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

25. Ms. Mehta submitted that by virtue of the aforesaid provisions of the State GST Act, the Commissioner State Tax could be said to be empowered to delegate his powers of provisional attachment under Section 83 of the State GST Act.

26. At this stage, it is necessary to look into few provisions of the Central GST Act, 2017. Section 2(24) of the CGST Act, 2017 defines "Commissioner" as under:

"'Commissioner' means the Commissioner of State tax appointed under section 3 and

includes the Chief Commissioner or Principal Commissioner of State tax appointed under section 3;"

27 Section 2(25) of the CGST Act defines "Commissioner in the Board" as under:

"2(25) "Commissioner in the Board" means the Commissioner referred to in section 168;"

28. Section 83 of the CGST Act is pari materia to Section 83 of the State GST Act. Section 167 of the CGST Act with regard to the delegation of powers reads as under:

"167. Delegation of powers. The Commissioner may, by notification, direct that subject to such conditions, if any, as may be specified in the notification, any power exercisable by any authority or officer under this Act may be exercisable also by another authority or officer as may be specified in such notification."

29. Section 168 of the CGST Act, 2017 reads as under:

"168. (1) The Board may, if it considers it necessary or expedient so to do for the purpose of uniformity in the implementation of this Act, issue such orders, instructions or directions to the central tax officers as it may deem fit, and thereupon all such officers and all other persons employed in the implementation of this Act shall observe and follow such orders, instructions or directions.

(2) The Commissioner specified in clause (91) of section 2, subsection (3) of section 5, clause (b) of subsection (9) of section 25, subsections (3) and (4) of section 35, subsection (1) of section 37, subsection (2) of section 38, subsection (6) of section 39, subsection (5) of section 66, subsection (1) of section 143, subsection (1) of section 151, clause (1) of subsection (3) of section 158 and section 167 shall mean a

Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said sections with the approval of the Board."

30. The comparison of the provisions of the State GST Act and the CGST would indicate that there is a vast difference between the two. Section 168(2) of the CGST Act clarifies that the Commissioner specified in subsection(3) of Section 5 shall mean a Commissioner or Joint Secretary posted in the Board and such Commissioner or Joint Secretary shall exercise the powers specified in the said section with the approval of the Board. Thus, the distinguishing feature is that so far as the CGST Act is concerned, the power of delegation under Section 5(3) of the Act therein is with the Commissioner in the Board and not the Commissioner of the Central Tax. Whereas, so far as Section 5(3) of the State GST Act is concerned, the Commissioner would be the Commissioner of the State Tax. If the provisions of the CGST Act would have been applicable to the facts of the present case, then there would have been no difficulty at all in quashing the order passed by the Commissioner of the State Tax delegating his power of Section 83 to the subordinate officers on the ground that the same is without jurisdiction. However, it appears that so far as the State GST Act is concerned, the Commissioner, in Section 5(3) of the Act, would be the Commissioner of the State Tax and in the same manner, the Commissioner, in Sections 167 and 168 of the Act respectively, shall also be the Commissioner of the State Tax.

31. Delegation is the act of making or

commissioning a delegate. It generally means parting of powers by the person who grants the delegation and conferring of an authority to do things which otherwise that person would have to do himself. Delegation is defined in Black's Law Dictionary as "the act of entrusting another with authority by the empowering another to act as an agent or representative". In P. Ramanatha Aiyar's, The Law Lexicon, "delegation is the act of making or commissioning a delegate. Delegation generally means parting of powers by the person who grants the delegation, but it also means conferring of an authority to do things which otherwise that person would have to do himself". Justice Mathew in **Gwalior Rayon Silk Manufacturing (Wvg.) Co. Ltd. v. The Assistant Commissioner of Sales Tax and Others [1974 (4) SCC 98]**, has succinctly discussed the concept of delegation.

Paragraph 37 reads as follows:

"37. ... Delegation is not the complete handing over or transference of a power from one person or body of persons to another. Delegation may be defined as the entrusting, by a person or body of persons, of the exercise of a power residing in that person or body of persons, to another person or body of persons, with complete power of revocation or amendment remaining in the grantor or delegator. It is important to grasp the implications of this, for, much confusion of thought has unfortunately resulted from assuming that delegation involves or may involve, the complete abdication or abrogation of a power. This is precluded by the definition. Delegation often involves the granting of discretionary authority to another, but such authority is purely derivative. The ultimate power always remains in the delegator and is never renounced."

32. As a general rule, whatever a

person has power to do himself, he may do by means of an agent. This broad rule is limited by the operation of the principle that a delegated authority cannot be redelegated, *delegatus non potest delegare*. The naming of a delegate to do an act involving a discretion indicates that the delegate was selected because of his peculiar skill and the confidence reposed in him and there is a presumption that he is required to do the act himself and cannot redelegate his authority. As a general rule, "if the statute directs that certain acts shall be done in a specified manner or by certain persons, their performance in any other manner than that specified or by any other person than one of those named is impliedly prohibited. Normally, a discretion entrusted by the Parliament to an administrative organ must be exercised by that organ itself. At the same time, it is settled position of law that the maxim "*delegatus non potest delegare*" must not be pushed too far. The maxim does not embody a rule of law. It indicates a rule of construction of a statute or other instrument conferring an authority. *Prima facie*, a discretion conferred by a statute on any authority is intended to be exercised by that authority and by no other. However, the intention may be negatived by any contrary indications in the language, scope or object of the statute. The construction that would best achieve the purpose and object of the statute should be adopted."

33. At this stage, in the aforesaid context, we may deal with the submission canvassed by Ms. Mehta that in the case on hand, the order of provisional attachment under Section

83 of the Act came to be passed because of the pendency of proceedings under Section 67 of the Act. The submission of Ms. Mehta is that Section 67 of the Act confers power of inspection, search and seizure. Where the proper officer not below the rank of Joint Commissioner has reasons to believe that 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 indulged in contravention of any of the provisions of the Act or the rules made thereunder to evade tax under the Act 2017, then such proper officer not below the rank of Joint Commissioner may authorize in writing any other officer of the State 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. According Ms. Mehta, if, ultimately, the entire exercise of inspection, search and seizure is undertaken by an authorized person, then such authorized officer can always be delegated with the power to pass an order of provisional attachment under Section 83 if the authorized officer who is of the opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue. We are afraid we are not in a position to accept this argument.

34. The first and the foremost thing which needs to be noted is that even for the purpose of Section 67, the satisfaction has to be of the proper officer not below the rank of the Joint Commissioner. If the proper officer not below the rank of the Joint Commissioner has reasons to believe that a taxable person has

indulged in contravention of any of the provisions of the Act, 2017 or the rules, then in such circumstances, he may authorize in writing any other officer to carry out the inspection, search and seizure. Therefore, when an authorized officer carries out an inspection, search and seizure, the same is merely on the basis of the satisfaction recorded or arrived at by the proper officer not below the rank of the Joint Commissioner. The authorized officer is merely executing or implementing the order that may be passed by the proper officer not below the rank of the Joint Commissioner for the purpose of Section 67 of the Act, 2017.

35. In the case on hand, Section 83 makes it abundantly clear that it is the Commissioner's opinion which is relevant. The Legislature has thought fit to confer this power upon the Commissioner. Whether such power conferred upon the Commissioner by the legislature could have been delegated to the three subordinate officers referred to above by virtue of the order dated 15th January 2018 passed in exercise of power under subsection (3) of Section 5 read with clause 19 of Section 2 of the Act and the rules framed thereunder. In our opinion, the answer has to be in the negative. Although there is no specific challenge to the order dated 15th January 2015 passed by the Commissioner of State Tax delegating his power under Section 83 to the subordinate officers, yet, we are of the view that by virtue of such order, such impugned order of provisional attachment cannot be defended.

36. We now propose to examine the

matter from a different angle. Let us for the time being proceed on the footing that it was within the powers of the Commissioner to delegate his power of provisional attachment under Section 83 of the Act upon the three subordinate officers by virtue of subsection(3) of Section 5 read with clause 91 of Section 2 of the Act, 2017. Section 83 talks about the opinion which is necessary to be formed for the purpose of protecting the interest of the government revenue. Any opinion of the authority to be formed is not subject to objective test. The language leaves no room for the relevance of an official examination as to the sufficiency of the ground on which the authority may act in forming its opinion. But, at the same time, there must be material based on which alone the authority could form its opinion that it has become necessary to order provisional attachment of the goods or the bank account to protect the interest of the government revenue. The existence of relevant material is a precondition to the formation of opinion. The use of the word "may" indicates not only the discretion, but an obligation to consider that a necessity has arisen to pass an order of provisional attachment with a view to protect the interest of the government revenue. Therefore, the opinion to be formed by the Commissioner or take a case by the delegated authority cannot be on imaginary ground, wishful thinking, howsoever laudable that may be. Such a course is impermissible in law. At the cost of repetition, the formation of the opinion, though subjective, must be based on some credible material disclosing that is necessary to provisionally attach the goods or the bank account for the purpose of

protecting the interest of the government revenue. The statutory requirement of reasonable belief is to safeguard the citizen from vexatious proceedings. "Belief" is a mental operation of accepting a fact as true, so, without any fact, no belief can be formed. It is equally true that it is not necessary for the authority under the Act to state reasons for its belief. But if it is challenged that he had no reasons to believe, in that case, he must disclose the materials upon which his belief was formed, as it has been held by the Supreme Court in Sheonath Singh's case [AIR 1971 SC 2451], that the Court can examine the materials to find out whether an honest and reasonable person can base his reasonable belief upon such materials although the sufficiency of the reasons for the belief cannot be investigated by the Court. In the case at hand, Ms. Mehta, the learned A.G.P. Appearing for the respondents very fairly submitted that not only the impugned order of provisional attachment is bereft of any reason, but there is nothing on the original file on the basis of which this Court may be in a position to ascertain the genuineness of the belief formed by the authority. The word "necessary" means indispensable, requisite; indispensably requisite, useful, incidental or conducive; essential; unavoidable; impossible to be otherwise; not to be avoided; inevitable. The word "necessary" must be construed in the connection in which it is used. The formation of the opinion by the authority should reflect intense application of mind with reference to the material available on record that it had become necessary to order provisional attachment of the goods or the bank

account or other articles which may be useful or relevant to any proceedings under the Act. [see: **Bhikhubhai Vithlabhai Patel and others vs. State of Gujarat AIR 2008 SCC 1771**].

37. In **J. Jayalalitha vs. U.O.I. [AIR 1999 SC 1912]**, the Supreme Court while construing the expression "as may be necessary" employed in Section 3 (1) of the Prevention of Corruption Act, 1988 which conferred the discretion upon the State Government to appoint as many Special Judges as may be necessary for such area or areas or for such case or group of cases to try the offences punishable under the Act, observed :

"The legislature had to leave it to the discretion of the Government as it would be in a better position to know the requirement. Further, the discretion conferred upon the Government is not absolute. It is in "The nature of a statutory obligation or duty. It is the requirement which would necessitate exercise of power by the Government. When a necessity would arise and of what type being uncertain the legislature could not have laid down any other guideline except the guidance of "necessity". It is really for that reason that the legislature while conferring discretion upon the Government has provided that the Government shall appoint as many Special Judges as may be necessary. The words "as may be necessary" in our opinion is the guideline according to which the Government has to exercise its discretion to achieve the object of speedy trial. The term "necessary" means what is indispensable, needful or essential."

38. In **Barium Chemicals Ltd. vs. Company Law Board [AIR 1967 SC 295]**, the Supreme Court pointed out, on consideration of several English and Indian authorities that the expressions "is satisfied", "is of the

opinion" and "has reason to believe" are indicative of subjective satisfaction, though it is true that the nature of the power has to be determined on a totality of consideration of all the relevant provisions.

The Supreme Court while construing Section 237 of the Companies Act, 1956 held :

"64. The object of S. 237 is to safeguard the interests of those dealing with a company by providing for an investigation where the management is so conducted as to jeopardize those interests or where a company is floated for a fraudulent or an unlawful object. Clause (a) does not create any difficulty as investigation is instituted either at the wishes of the company itself expressed through a special resolution or through an order of the court where a judicial process intervenes. Clause (b), on the other hand, leaves directing an investigation to the subjective opinion of the government or the Board. Since the legislature enacted S. 637 (I) (a) it knew that government would entrust to the Board its power under S. 237 (b). Could the legislature have left without any restraints or limitations the entire power of ordering an investigation to the subjective decision of the Government or the Board? There is no doubt that the formation of opinion by the Central Government is a purely subjective process. There can also be no doubt that since the legislature has provided for the opinion of the government and not of the court such an opinion is not subject to a challenge on the ground of propriety, reasonableness or sufficiency. But the Authority is required to arrive at such an opinion from circumstances suggesting what is set out in subclauses (I), (ii) or (iii). If these circumstances were not to exist, can the government still say that in its opinion they exist or can the Government say the same thing where the circumstances relevant to the clause do not exist? The legislature no doubt has used the expression "circumstances suggesting". But that expression means that the circumstances need not be such as would conclusively establish

an intent to defraud or a fraudulent or illegal purpose. The proof of such an intent or purpose is still to be adduced through an investigation. But the expression "circumstances suggesting" cannot support the construction that even the existence of circumstances is a matter of subjective opinion. That expression points out that there must exist circumstances from which the Authority forms an opinion that they are suggestive of the crucial matters set out in the three subclauses. It is hard to contemplate that the legislature could have left to the subjective process both the formation of opinion and also the existence of circumstances on which it is to be founded. It is also not reasonable to say that the clause permitted the Authority to say that it has formed the opinion on circumstances which in its opinion exist and which in its opinion suggest an intent to defraud or a fraudulent or unlawful purpose. It is equally unreasonable to think that the legislature could have abandoned even the small safeguard of requiring the opinion to be founded on existent circumstances which suggest the things for which an investigation can be ordered and left the opinion and even the existence of circumstances from which it is to be formed to a subjective process. These analysis finds support in Gower's Modern Company Law (2nd Ed.) p. 547 where the learned author, while dealing with S. 165(b) of the English Act observes that "the Board of Trade will always exercise its discretionary power in the light of specified grounds for an appointment on their own motion" and that "they may be trusted not to appoint unless the circumstances warrant it but they will test the need on the basis of public and commercial morality." There must therefore exist circumstances which in the opinion of the Authority suggest what has been set out in subclauses (I), (ii) or (iii). If it is shown that the circumstances do not exist or that they are such that it is impossible for any one to form an opinion therefrom suggestive of the aforesaid things, the opinion is challengeable on the ground of non application of mind or perversity or on the ground that it was formed on collateral grounds and was beyond the scope of the statute.

39. The Supreme Court while expressly referring to the expressions such as "reason to believe", "in the opinion" of observed :

"Therefore, the words, "reason to believe" or "in the opinion of do not always lead to the construction that the process of entertaining "reason to believe" or "the opinion" is an altogether subjective to process not lending itself even to a limited scrutiny by the court that such "a reason to believe" or "opinion" was not formed on relevant facts or within the limits or as Lord Radcliffe and Lord Reid called the restraints of the statute as an alternative safeguard to rules of natural justice where the function is administrative."

40. In the **Income tax Officer, Calcutta and Ors. vs. Lakhmani Mewal Das [AIR 1976 SC 1753]**, the Supreme Court construed the expression "reason to believe" employed in Section 147 of the Income Tax Act, 1961 and observed: the reasons for the formation of the belief must have a rational connection with or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the Income tax Officer and the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully or truly all material facts. It is not any or every material, howsoever vague and indefinite or distant which would warrant the formation of the belief relating to the escapement of the income of the assessee from assessment. The reason for the formation of the belief must be held in good faith and should not be a mere pretence.

41. In **Bhikhubhai Vithalabhai Patel (supra)**, the Supreme Court observed in paras 32 and 33 as under:

"32. We are of the view that the construction placed on the expression "reason to believe" will equally be applicable to the expression "is of opinion" employed in the proviso to Section 17 (1) (a) (ii) of the Act. The expression "is of opinion", that substantial modifications in the draft development plan and regulations, "are necessary", in our considered opinion, does not confer any unlimited discretion on the Government. The discretion, if any, conferred upon the State Government to make substantial modifications in the draft development plan is not unfettered. There is nothing like absolute or unfettered discretion and at any rate in the case of statutory powers. The basic principles in this regard are clearly expressed and explained by Prof. Sir William Wade in Administrative Law (Ninth Edn.) in the chapter entitled 'abuse of discretion' and under the general heading the principle of reasonableness' which read as under :

"The common theme of all the authorities so far mentioned is that the notion of absolute or unfettered discretion is rejected. Statutory power conferred for public purposes is conferred as it were upon trust, not absolutely that is to say, it can validly be used only in the right and proper way which Parliament when conferring it is presumed to have intended. Although the Crown's lawyers have argued in numerous cases that unrestricted permissive language confers unfettered discretion, the truth is that, in a system based on the rule of law, unfettered governmental discretion is a contradiction in terms. The real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. For this purpose everything depends upon the true intent and meaning of the empowering Act.

The powers of public authorities are therefore essentially different from those of private persons. A man making his will

may, subject to any rights of his dependents, dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land, to release a debtor, or, where the law permits, to evict a tenant, regardless of his motives. This is unfettered discretion. But a public authority may do none of these things it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion is inappropriate to a public authority, which possesses powers solely in order that it may use them for the public good. There is nothing paradoxical in the imposition of such legal limits. It would indeed be paradoxical if they were not imposed."

33. The Court is entitled to examine whether there has been any material available with the State Government and the reasons recorded, if any, in the formation of opinion and whether they have any rational connection with or relevant bearing on the formation of the opinion. The Court is entitled particularly, in the event, when the formation of the opinion is challenged to determine whether the formation of opinion is arbitrary, capricious or whimsical. It is always open to the court to examine the question whether reasons for formation of opinion have rational connection or relevant bearing to the formation of such opinion and are not extraneous to the purposes of the statute."

42. In the absence of any cogent or credible material, if the subjective satisfaction is arrived at by the authority concerned for the purpose of passing an order of provisional attachment under Section 83 of the Act, then such action amounts to malice in law. Malice in its legal sense means such malice as may be assumed from the doing of a wrongful act intentionally but also without just cause or excuse or for want of

reasonable or probably cause. Any use of discretionary power exercised for an unauthorized purpose amounts to malice in law. It is immaterial whether the authority acted in good faith or bad faith. In the aforesaid context, we may refer to and rely upon a decision of the Supreme Court in the case of **Smt. S.R. Venkatraman vs. Union of India** reported in (1979) ILLJ 25(SC) where it had been held:

"There will be an error of fact when a public body is prompted by a mistaken belief in the existence of a nonexisting fact or circumstances. This is so clearly unreasonable that what is done under such a mistaken belief might almost be said to have been done in bad faith; and in actual experience and as things go, they may well be said to run into one another. The influence of extraneous matters will be undoubtedly there where the authority making the order has admitted their influence. An administrative order which is based on reasons of fact which do not exist must be held to be infected with an abuse of power."

We may also refer to and rely upon a decision of the Supreme Court in the case of **ITO Calcutta vs. Lakhmani Mewal Das** reported in [(1976) 103 ITR 437 (SC)] wherein it had been held as under:

"The reasons for the formation of the belief contemplated by Section 147(a) of the Income tax Act, 1961, for the reopening of an assessment must have a rational connection or relevant bearing on the formation of the belief. Rational connection postulates that there must be a direct nexus or live link between the material coming to the notice of the I.T.O. And the formation of his belief that there has been escapement of the income of the assessee from assessment in the particular year because of his failure to disclose fully and truly all material facts. It is no doubt true that the Court cannot go

into the sufficiency or adequacy of the material and substitute its own opinion for that of the I.T.O. On the point as to whether action should be initiated for reopening the assessment. At the same time we have to bear in mind that it is not any and every material, howsoever vague and indefinite or distant, remote and farfetched, which would warrant the formation of the belief relating to escapement of the income of the assessee from assessment.

The reason for the formation of the belief must be held in good faith and should not be a mere pretence."

43. There is one another pertinent feature of this matter. When the search of the industrial premises of the writ applicant was undertaken, the further inquiry in that regard revealed that there were no goods involved, but there were only billing transactions. At the time of the search, goods worth Rs.2,48,59,485/were found stored at the industrial premises of the writ applicant. The authority came to the conclusion that the tax liability which may be determined in future under Section 74 of the Act may be to the tune of Rs.1,60,00,000/(Rupees One Crore Sixty Lakh only), and in such circumstances, thought fit to provisionally attach the goods worth only Rs.1,60,00,000/from the total goods worth Rs.2,48,59,485/(Rupees Two Crore Forty Eight Lakh Fifty Nine Thousand Four Hundred Eighty Five only).

44. We would like to add something more to what we have stated above. It would be a big mistake on the part of the respondents to understand that the reasons to believe necessary for the purpose of carrying out inspection,

search and seizure under Section 67 of the Act, 2017 would be sufficient enough for the purpose of formation of the opinion that it is necessary to provisionally attach the goods or other articles for the purpose of protecting the interest of the government revenue. In our opinion, Section 83 of the Act stands altogether on a different footing. The considerations also are quite different for the purpose of exercising the power of provisional attachment under Section 83 of the Act. Just because, some proceedings are initiated under Section 67 by itself would not be sufficient to arrive at the satisfaction that it is necessary to provisionally attach the property for the purpose of protecting the interest of the government revenue. The power has been specifically conferred upon the Commissioner to form such an opinion. The legislature was quite alive to the fact that an order of provisional attachment cannot be as a matter of course. It is one of the drastic measures which the authority may be compelled to take if the situation demands for the purpose of protecting the interest of the government revenue. Under Section 67 of the Act, 2017, the legislature has thought fit to use the words "proper officer not below the rank of Joint Commissioner". In Section 83, even that discretion is taken away and it is only the Commissioner who has been empowered to act under Section 83 of the Act. In our opinion, therefore, the subjective satisfaction, which is required for the purpose of Section 83 of the Act, is not dependent on Section 67 of the Act or to put it in other words, just because, a search has been undertaken resulting in seizure of goods by

itself may not be sufficient to arrive at the subjective satisfaction that it is necessary to pass an order of provisional attachment to protect government revenue.

45. In the case on hand, the challenge is also to the order in form GST DRC - 07 (Rule 142(5) of the Rules. This order dated 17th June 2019 [Annexure : 'A' to this writ application) is an assessment order purported to have been passed under Section 74 of the Act. Section 74 reads as under:

"74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful misstatement or suppression of facts.

(1)Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful misstatement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice along with interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2)The proper officer shall issue the notice under subsection (1) at least six months prior to the time limit specified in subsection (10) for

issuance of order.

(3) Where a notice has been issued for any period under subsection (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under subsection (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful-misstatement or suppression of facts to evade tax, for periods other than those covered under subsection (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under subsection (1), pay the amount of tax along with interest payable under section 50 and a penalty equivalent to fifteen per cent. Of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under subsection (1) pays the said tax along with interest payable under section 50 and a penalty equivalent to twenty five per cent. Of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under subsection (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under subsection (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent. Of such tax within thirty days of communication of the order, all proceedings in respect of the said

notice shall be deemed to be concluded.

Explanation 1.— For the purposes of section 73 and this section,

(I) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132;

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation 2.—For the purposes of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

46. Thus, Section 74 provides for determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilized by reason of fraud or any wilful misstatement or suppression of fact. The case of the department is very specific.

47. Rule 142(5) of the Rules 2017 reads as under:

"142. Miscellaneous transitional provisions.

(5) Notwithstanding anything to the contrary contained in this Act, any amount of input

tax credit reversed prior to the appointed day shall not be admissible as input tax credit under this Act."

48. It appears from the materials on record that without issue of any show cause notice, the tax liability came to be determined under Section 74 of the Act. Section 74 makes it abundantly clear that the defaulter should be called upon to show cause as to why he should not be paid the amount specified in the notice along with the interest payable thereon. There could not have been any assessment under Section 74 of the Act without giving any opportunity of hearing to the writ applicant. In such circumstances, the order is not tenable in law and deserves to be quashed and set aside. We also fail to understand as to on what basis the input tax credit could have been blocked by way of computer entry. At the most, the same could have been ordered to be provisionally attached, but how could the same have been blocked. Such action is also not sustainable in law.

49. Section 83 of the Act, 2017 is in pari materia with the provisions of Section 281B of the Income Tax Act, 1961. Section 281B of the Act, 1961 also provides for a provisional attachment of the property of an assessee pending the adjudication an assessment / reassessment proceedings where the income tax department believes that such attachment is necessary to protect the interest of the revenue. The provisions of Section 281B of the Act, 1961 is extracted below for the sake of completion and to demonstrate that the provisions of Section 83 have been framed along identical lines as Section 281B:

"1) Where during the pendency of any proceeding (or the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, the Assessing Officer is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, he may, with the previous approval of the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the IncomeTax Act, 1961.

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of six months from the date of the order made under head (1).

However, the Principal Chief Commissioner or Chief Commissioner, Principal Commissioner or Commissioner, Principal Director General or Director General or Principal Director or Director may, for reasons to be recorded in writing. Extend the aforesaid period by such further period or periods as he thinks fit. So, however, that the total period of extension shall not in any case exceed two years or sixty days after the date of order of assessment or reassessment. Whichever is later.

(3) Where the assessee furnishes a guarantee from a scheduled bank for an amount not less than the fair market value of the property provisionally attached under head (1) the Assessing Officer shall, by an order in writing, revoke such attachment.

However where the Assessing Officer is satisfied that a guarantee from a scheduled bank for an amount lower than the fair market value of the property is sufficient to protect the interests of the revenue, he may accept such guarantee and revoke the attachment.

(4) The Assessing Officer may, for the purposes of determining the value of the property provisionally attached under head (1), make a reference to the Valuation Officer referred to in the provision of the IncomeTax Act, 1961 who shall estimate the fair market value of the property in the manner provided under that provision and submit a report of the estimate to the Assessing Officer within a period of thirty days from the date of receipt of such reference.

(5) An order revoking the provisional attachment under head (3) shall be made

(a) within forty-five days from the date of receipt of the guarantee, where a reference to the Valuation Officer has been made under head (4); or (b) within fifteen days from the date of receipt of guarantee in any other cases.

(6) Where a notice of demand specifying a sum payable is served upon the assessee and the assessee fails to pay that sum within the time specified in the notice of demand, the Assessing Officer may invoke the guarantee furnished under head (3) wholly or in part, to recover the amount.

(7) The Assessing Officer shall, in the interests of the revenue, invoke the bank guarantee, if the assessee fails to renew the guarantee referred to in head (3), or fails to furnish a new guarantee from & scheduled bank for an equal amount. Fifteen days before the expiry of the guarantee referred to in head (3).

(8) The amount realised by invoking the guarantee referred to in head (3) shall be adjusted against the existing demand which is payable by the assessee and the balance amount, if any, shall be deposited in the Personal Deposit Account of the Principal Commissioner or Commissioner in the branch of the Reserve Bank of India or the State Bank of India or subsidiaries or any bank as may be appointed by the Reserve Bank of India as its agent under the provisions of

subsection

(1) of section 45 of the Reserve Bank of India Act, 1934 at the place where the office of the Principal Commissioner or Commissioner is situate.

(9) Where the Assessing Officer is satisfied that the guarantee referred to in head (3) is not required anymore to protect the interests of the revenue, he shall release that guarantee forthwith.

For the purposes of this provision¹³. The expression "scheduled bank" shall mean a bank included in the Second Schedule to the Reserve Bank of India Act, 1934."

50. In the aforesaid context, we may quote:

"Halbury's Laws of India (Direct Tax II, Vol 32), 2nd Edn. Halsbury's Laws of India (Direct Tax II, Vol 32) 2nd edn. 7. Miscellaneous

This provision relating to making an attachment before judgment, ie, before assessment order is made, is legal if assessing authority is of opinion that it is necessary to protect interests of revenue and same is supported by supervening factor. It gives guidelines for making provisional attachment and is, thus, constitutionally valid. The power conferred upon the Assessing Officer under this provision is a very drastic farreaching power and that power has to be used sparingly and only on substantive weighty grounds and reasons. To ensure that this power is not misused, a number of safeguards have been provided in the provision itself. This power should be exercised by the Assessing Officer only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should therefore be exercised with extreme care and caution. Moreover. Power under this provision is to be exercised only if there

is sufficient material on record to justify satisfaction that assessee is about to dispose of whole or any part of his property with a view to thwarting ultimate collection of demand and in order to achieve said objective attachment should be of properties and to extent it is required to achieve this object. It should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Attachment of bank accounts and trading assets should be resorted to only as a last resort. In any event, attachment under this provision should not be equated with attachment in the course of recovery proceedings. In the event the revenue is adequately protected by attachment, there is no justification for Assessing Officer for making an days of order of assessment. Further, provisional attachment can be levied even in cases where proceedings under provisions of the Income Tax Act, 1961 dealing with search and Seizure are yet to be initiated. Therefore, invoking this provision and issuing notice under the provision of the Income Tax Act, 1961 dealing with assessment in case of search or requisition on same day would not effect validity of order passed under this provision.

Where on facts Assessing Officer was satisfied that it was necessary to attach properties of assessee in order to protect interest of revenue and due approval was taken from concerned Commissioner who opined that it was ~~not~~ case for provisional attachment, order passed under this provision in respect of certain properties of assessee would not warrant judicial review. It is for assessing authority to decide as to which of assets could be liquidated without difficulty for realization of tax assessed. Moreover. An assessee cannot compel Assessing Officer to attach any particular property. Since this provision provides for attachment of property of assessee only and, therefore. An order directing attachment of fixed deposits of assessee would be illegal. However this provision does not contain requirement of hearing before passing order of provisional attachment of assessee's bank account. Application of the assessee pending before

Assistant Commissioner for release of assets attached must be disposed of the earliest for the ends of justice.

An order for provisional attachment passed under this provision is valid only for a period of six months and ceases to have effect after the expiry of six months from the date of the order. However, time can be extended for a further period of six month. Appropriate order for extension of period of provisional attachment would only be passed upon satisfaction of the criteria listed out. An injunction/stay order passed during pendency of assessment proceedings does not on its own or by deeming fiction. Extend period stipulated in order. Upon the expiry of the period stipulated in the order demanding provisional attachment, assessee is entitled to encash his money minus any tax due. An extension of provisional attachment without recording any reasons, such order must be taken to be illegal and non est. When assessee has filed an appeal challenging order of assessment within time period prescribed under the provision of the Income Tax Act, 1961 dealing with appealable orders along with a stay application, Assessing Officer cannot not pass an order of attachment in terms of this provision during pendency of said appeal. When property, which is subject matter of provisional attachment, is sufficient to satisfy tax liability and safeguard interest of revenue, petitioner can seek release of provisional attachment in respect of other properties and amounts due from debtors and depositors."

51. Thus, although the provisions of Section 281B of the Income Tax Act is *pari materia* to Section 83 of the State GST Act, yet one pertinent feature of Section 281B of the Income Tax Act is that it gives guidelines for making the provisional attachment. Such guidelines are missing so far as Section 83 of the State GST Act is concerned.

52. Our final conclusions may be

summarized as under:

[1] The order of provisional attachment before the assessment order is made, may be justified if the assessing authority or any other authority empowered in law is of the opinion that it is necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or farfetching, which would warrant the formation of the belief.

[2] The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and far-reaching power. Such power should be used sparingly and only on substantive weighty grounds and reasons.

[3] The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution.

[4] The power under Section 83 of the Act for provisional attachment should be exercised only if there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly

or any part of his / her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.

[5] The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

[6] The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings.

[7] The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (I) whether it is a revenue neutral situation (ii) the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax credit if the interest of the revenue is sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment."

6. The dictum of law, as laid in the decision of this Court in the case of **Valerius Industries (Supra)**, can straight way be made applicable to the

case on hand. In the case on hand, we looked into the order passed by the Assistant Commissioner of State Tax under Section 83 of the Act.

7. By placing reliance on the averments made in the affidavit-in-reply duly affirmed by the Assistant Commissioner, Mr. Joshi, the learned Assistant Government Pleader appearing for the respondent-Authorities, invited the attention of this Court to paragraph Nos. 17, 18, 19 and 20 of the affidavit-in-reply. We quote the paragraph Nos. 17 to 20 as under:

"17. I say and submit that the factual matrix in the present petition is that the Directions of the petitioner company Dinesh Hinduja, Bijay Agrawal and Sonali Agrawal have been served upon summons to cooperate with the investigation qua billing transaction of the petitioner company with one Shivay Enterprise whose proprietor is Tushar Makwana. It is further required to be noted that the said Directors have till date not cooperated with the respondent authorities and are not traceable. Their official representative Trilok Chauhan was present at the time when the search operation took place even Dinesh Hinduja one of the Director was also present but, thereafter, the authorities have not been in a position to find his whereabouts of Dinesh Hinduja as well. The present petition is filed through the said legal representative Trilok Chauhan.

18. I say and submit that the respondent authorities with a view to unearth the billing transactions had taken the statement of Trilok Chauhan, the

proprietor of Shivay Enterprise Tushar Makwana who in his statement has categorically mentioned that he was given merely Rs.8,000/- per month for the purpose of making and providing such fake bills with a view to avail the input tax credit, such bills were given to the petitioner company. He in his statement further mentions that the said amount of Rs.8,000/- was given to him by either Madhav Shah or Samkit Shah who was working as head cashier in Central Bank of India.

19. I say and submit that during the course of investigation, the authorities have also taken the statement of Shri Tushar Makwana, Madhav Shah as well as Samkit Shah, the statement of said three persons reveals the complete modus of billing transactions. Annexed herewith and marked as Annexure-R-3 is the copy of the statement so Madhav Shah and Sanket Shah.

20. I say and submit that the entire issue is with respect to obtaining fake bills for the purpose of availing input tax credit without actual movement of goods. The said bills were provided by Shivay Enterprise to the petitioner. The petitioner has involved in billing activities with Shivay Enterprise to the tune of Rs.49.80 Lakhs defrauding the government. The authorities hence has levied interest amounting to Rs.12.24 Lakhs and penalty of Rs.49.80 Lakhs. The statement of Sanket Shah, the head cashier of the Central Bank of India on several occasion he was given Rs.8,000/- to the proprietor of Shivay Enterprise viz. Tushar Makwana, for providing false bills."

8. By relying upon the averments made in the aforesaid paragraphs, an attempt is made on the part of the learned Assistant Government Pleader appearing for the respondent-Authorities to submit that there was sufficient material with the Assistant Commissioner to arrive at the subjective satisfaction that it is necessary to pass an order of provisional attachment to protect the interest of the Revenue.

9. We are not in a position to accept such submission. What has been stated in paragraph Nos.17 to 20 of the affidavit-in-reply, has something to do with the merits of the case, for which, notice under Section 73 of the GGST Act, 2017, has been issued upon the writ applicant and the proceedings are pending before the concerned authority. What is lacking in the present case is the credible material, in its true sense, for the purpose of arriving at the subjective satisfaction that the order of provisional attachment is necessary for the purpose of protecting the interest of the Revenue. In the case of **Valerius Industries (Supra)**, we have taken the view that the Commissioner ought not to have delegated his powers of provisional attachment under Section 83 of the Act to the Assistant Commissioner. Therefore, in the case on hand, the order of provisional attachment as well as the order of prohibition are not sustainable on two counts, i.e. (i) the order has been passed by the Assistant Commissioner, and (ii) the order has been passed without any credible materials, available for the purpose of passing such order of provisional

attachment.

10. In the result, this Writ Application succeeds and is hereby allowed. The order of provisional attachment passed by the Assistant Commissioner, so far as the immovable property is concerned, is hereby quashed and set aside. In the same manner, the order of provisional attachment of the bank accounts is also hereby quashed and set aside. Consequently, the order of prohibition dated 30th July, 2019, which is annexed as Annexure-"C" to this petition passed under Rule 139(4) of the Rules, 2017, is also quashed and set aside.

11. However, we clarify that as the proceedings under Section 73 of the said Act are pending as on date, the writ applicant shall not destroy or secrete any books of account or any other documents relating to the same till the conclusion of the inquiry initiated under the provisions of the Act. In future, if the Authority is able to gather any credible material, on the basis of which it may arrive at the conclusion that it is necessary to order provisional attachment with a view to protect the interest of the Revenue, it shall be open for the Authority to do so, in accordance with law.

(J. B. PARDIWALA, J)

(BHARGAV D. KARIA, J)

PALAK