

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
R/SPECIAL CIVIL APPLICATION NO. 9807 of 2020

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KHUSHI SAREES
Versus
STATE OF GUJARAT

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Appearance:
MR.AVINASH PODDAR(9761) for the Petitioner(s) No. 1
MR. CHINTAN DAVE, LD. AGP for the Respondent(s) No. 1,2,3,4,5

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CORAM: HONOURABLE THE CHIEF JUSTICE MR. VIKRAM NATH
and
HONOURABLE MR. JUSTICE J.B.PARDIWALA

Date : 01/10/2020

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, a partnership firm through one of its partners, has prayed for the following reliefs;

“(A) to quash and set aside Form DRC IA dated 23.07.2020 issued by respondent no.4.

(B) to quash and set aside the impugned provisional attachment order, i.e, Form GST DRC-22 for residential premises issued in Form GST DRC 22 dated 24.07.2020 by respondent no.4

(C) to direct the respondents to transfer the proceedings to the CGST department as they had already initiated the same.

(D) pending admission, hearing and till final disposal of this petition, Your Lordship may be pleased to direct the Respondents

- (I) *To lift the attachment of factory premises;*
- (II) *To stay the operation of Form GST DRC 01A;*
- (III) *Not to take any coercive action against the petitioner.*
- (E) *To issue order(s), direction(s), writ(s) or any other relief(s) as this Hon'ble Court deems fit and proper in the facts and circumstances of the case and in the interest of justice;*
- (F) *To award Costs of and incidental to this application be paid by the Respondents;*
- (G) *And for this act of kindness, the Petitioner shall, as in duty bound, ever pray."*

2. The facts, in brief, leading to filing of this writ application, may be summarized as under:

2.1 The writ applicant is a partnership firm registered with the GST having GSTIN 24AAKHP5754L1ZN. The firm is engaged in the business of manufacturing of different types of textile fabrics. It appears that an inquiry has been initiated against the firm by the CGST Department, Surat by issuing summons under Section 70(1) of the Act, 2017 dated 25th June, 2020. It appears that pending the inquiry, the Department has taken two fold action. First an order in Form GST DRC-01A dated 23rd July, 2020 has been issued, Annexure-L, Page-43 of this paper-book and secondly, an order of provisional attachment of property under Section 83 of the Act in Form GST DRC-22 has been passed.

2.2 Being dissatisfied with the aforesaid action on the part of the GST Authorities, the writ applicant has come up before this Court with the present writ application.

3. We have heard Mr. Avinash Podar, the learned counsel appearing for the writ applicant and Mr. Chintan Dave, the learned AGP appearing for the State-respondents.

4. We are not inclined to interfere with the order passed in Form GST DRC-01A dated 23rd July, 2020, referred to above. However, we are of the view that the order of provisional attachment of the immovable property in the form of the residential premises under Section 83 of the Act is not sustainable in law. We quote the order passed in Form GST DRC-22 as under;

“FORM GST DRC -22

Reference No. Date 24.07.2020

To

Name:-M/s. Khushi Sarees

Address:- 1017 World Trade Center, Ring Road, Surat.

(Bank/Post Office/Financial Institution/Immovable Property registering authority)

Provisional attachment of property under section 83

It is to inform that M/s. (name) having principal place of business at (address) bearing registration number as (GSTIN/ID), PAN is 24AAKHP5754L1ZN a registered taxable person under the <<SGST/CGST>> Act. Proceedings have been launched against the aforesaid taxable person under section 74(5) 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 a <<saving/current/FD/RD/depository>> account in your <<bank/post office/financial institution>> having account no:-

Or

Property located at property ID & location- 401, Dev Prayag Apartment, Near Terapanth Bhawan, City Light Road, Surat.

In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, I D.J. Bamaniya, (name), Assi Commi. (Enf) Div 8 Surat (designation). Hereby provisionally attach the aforesaid account/property.”

5. A bare perusal of the order of provisional attachment, referred to above, would indicate that the same is nothing but a result of mechanical exercise of power under Section 83 of the Act, 2017. Section 83 of the Act, 2017 reads as under:

“SECTION 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.”

6. 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 Vitlabhai Patel and others vs. State of Gujarat AIR 2008 SCC 1771].

7. 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."

8. 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."

9. 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."

10. 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.

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11. 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.”

12. 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 probable 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) 111 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 non-existing 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.”

13. 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."

14. A Coordinate Bench of this Court, to which one of us J.B. Pardiwala, J. was a party, had the occasion to discuss Section 83 of the Act in the case of **Valerius Industries vs. Union of India**, Special Civil Application No.13132 of 2019, decided on 28th August, 2019, wherein this Court drew the following conclusion:

"[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 far-fetching, 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.

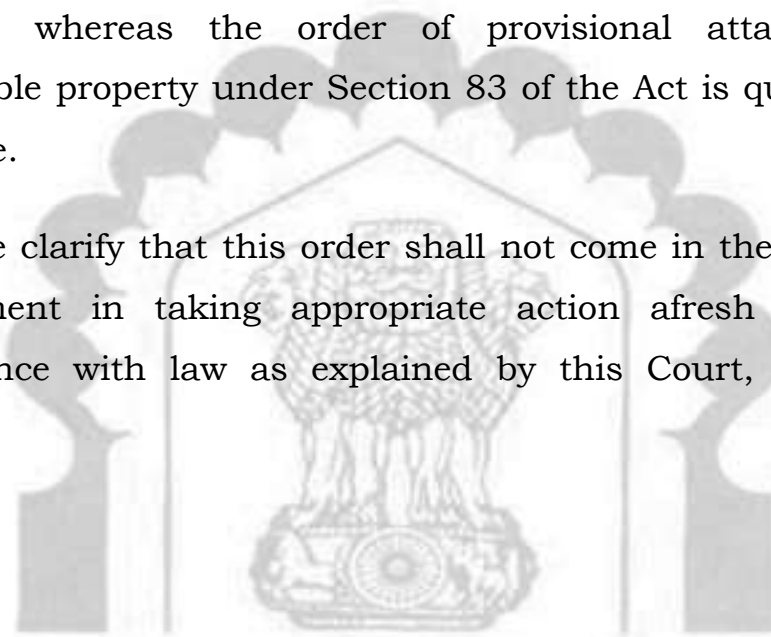
[7] The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (i) whether it is a revenue neutral situation (ii) the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax 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.”

15. We are of the view that none of the above referred conditions are fulfilled in the present case.

16. In the result, this writ application stands partly allowed. The relief with regard to the order in Form GST DRC-01A is not granted, whereas the order of provisional attachment of immovable property under Section 83 of the Act is quashed and set aside.

17. We clarify that this order shall not come in the way of the Department in taking appropriate action afresh strictly in accordance with law as explained by this Court, referred to above.



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(VIKRAM NATH, CJ)

THE HIGH COURT
OF GUJARAT

(J. B. PARDIWALA, J)

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