

**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD****R/SPECIAL CIVIL APPLICATION NO. 12498 of 2020****With****CIVIL APPLICATION (FOR FIXING DATE OF HEARING) NO. 1 of 2020****In R/SPECIAL CIVIL APPLICATION NO. 12498 of 2020****FOR APPROVAL AND SIGNATURE:****HONOURABLE MR. JUSTICE J.B.PARDIWALA****Sd/-****and****HONOURABLE MR. JUSTICE ILESH J. VORA****Sd/-**

1	Whether Reporters of Local Papers may be allowed to see the judgment ?	YES
2	To be referred to the Reporter or not ?	YES
3	Whether their Lordships wish to see the fair copy of the judgment ?	NO
4	Whether this case involves a substantial question of law as to the interpretation of the Constitution of India or any order made thereunder ?	NO

VINODKUMAR MURLIDHAR CHECHANI PROPRIETOR OF M/s CHECHANI  
TRADING CO.  
Versus  
STATE OF GUJARAT & 1 other(s)

**Appearance:**

MR TUSHAR HEMANI, SR.ADVOCATE WITH MS VAIBHAVI K.PARIKH for  
the Petitioner(s) No. 1

GOVERNMENT PLEADER(1) for the Respondent(s) No. 1,2

MRS KALPANA K.RAVAL with MR NIKUNT K RAVAL(5558) for the  
Respondent(s) No. 2

**CORAM: HONOURABLE MR. JUSTICE J.B.PARDIWALA****and****HONOURABLE MR. JUSTICE ILESH J. VORA****Date : 04/01/2021**

**ORAL JUDGMENT**  
**(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) quash and set-aside the impugned orders dated 28.8.2020 (inadvertently mentioned as 28.8.2018) at Annexure-A (Colly) provisionally attaching the CC/Current Bank Account No.066028304000013 held with the AMCO Bank, Current Bank Account No.02372320002872 and Savings Bank Account No.02371000038487 held by the Petitioner with the HDFC Bank Limited;*

*(b) pending the admission, hearing and final disposal of this petition, direct the Respondent No.2 to lift the attachment over the CC/Current Bank Account No.066028304000013 with the AMCO Bank, Current Bank Account No.02372320002872 and Savings Bank Account No.02371000038487 with the HDFC Bank Limited and permit the Petitioner to operate such bank account;*

*(c) any other and further relief deemed just and proper be granted in the interest of justice;*

*(d) to provide for the cost of this petition.”*

2. The facts giving rise to this writ-application may be summarised as under :

3. The writ-applicant is a proprietor of a proprietary concern running in the name of M/s.Chechani Trading Company. The concern is engaged in the business of trading of ferrous and non-ferrous metal scrap. The writ-applicant holds a valid registration certificate under the provisions of the CGST Act and the GGST Act respectively.

4. It appears from the materials on record that a spot visit was carried out by the flying squad of the department on 11<sup>th</sup> August 2020 at the premises of the writ-applicant. The department is *prima facie* of the view that the purchases made by the writ-applicant from the JSK Metacast and Uttam Metal and Alloys respectively are not genuine.

5. In the course of the search carried out by the department, the registers, documents and books of accounts for the period between 1<sup>st</sup> July 2017 and 11<sup>th</sup> August 2020 were collected and taken into possession.

6. It appears that the respondent no.2 passed an order dated 28<sup>th</sup> August 2020 (Annexure-A collectively to this writ-application) of provisional attachment of cash credit/current bank account and one savings bank account held by the writ-applicant with the HDFC Bank Limited.

7. The impugned order of provisional attachment in the Form GST DRC-22 reads thus :

“FORM GST DRC-22

(See Rule 159(1))

Dated : 28.08.2020

To,

*The Manager,  
AMCO Bank, Final Plot No.832,  
T.P.Scheme No.10, Raghuvir Textile Mills,  
Nr.Gujarat Bottling Co,  
Rakhial, Ahmedabad,  
Gujarat 380023*

*Provisional Attachment of Property under section 83*

*It is to inform that M/s.Chechani Trading Company having principal place of business at 1514, GIDC Phase-3, Vatva, Ahmedabad 382445 bearing registration number as GSTIN: 24AAHPC1431G1ZF, PAN No.AAHPC1431G is a registered taxable person under the CGST Act. Proceedings have been initiated 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 a-*

*Saving/current/FD/RD/depository account in your bank having account no.066028304000013.*

*In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, I Mohit Agrawal, Additional Commissioner, hereby provisionally attach the aforesaid account.*

*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.”*

8. Thus, it appears on plain reading of the order referred to above that as the proceedings under Section 67 of the Act came to be initiated, the Additional Commissioner thought fit to exercise his powers under Section 83 of the Act for the purpose of provisional attachment of the bank accounts referred to above.

9. Being dissatisfied with the order of provisional attachment referred to above, the writ-applicant is here before this Court with the present writ-application.

10. On 9<sup>th</sup> December 2020, this Court passed the following order :

*“1. We have heard Mr. Tushar Hemani, the learned Sr. Counsel assisted by Ms. Vaibhavi Parikh, the learned counsel appearing for the writ applicant and Mr. Chintan Dave, the learned AGP appearing for the State - respondents on advance copy served upon him.*

*2. The challenge in this writ application is to the legality and validity of the order of provisional attachment of the bank accounts passed under Section 83 of the Gujarat Goods and Services Tax Act, (“GST Act” for short). There are two orders on record. The first order is dated 28.08.2020 (inadvertently mentioned as 28.08.2018, at Annexure-A) passed by the Additional Commissioner, CGST, Ahmedabad South for the provisional attachment of the Cash Credit/Current Account*

held by the writ applicant with the AMCO Bank. The second order is also of the provisional attachment under Section 83 of the GST Act of one Current Bank Account and one Savings Bank Account held by the writ applicant in the HDFC Bank Ltd. The challenge to this action of invoking Section 83 of the Act by the respondents is on manifold grounds.

3. One of the submissions of Mr. Tushar Hemani, the learned Senior Counsel appearing for the writ applicant based on or rather fortified by few orders passed by this Court is that the Cash Credit Account cannot be ordered to be attached. In other words, the Cash Credit Account is an account, which enables the assessee to borrow the money from the bank for the purpose of its business. Any money, therefore, which the bank may make available to the assessee would necessarily be in the nature of a loan or cash credit facility. The view taken by our High Court in such circumstances is that, the bank and the assessee will not have the debtor - creditor relationship.

4. Mr. Chintan Dave, the learned AGP appearing for the State respondents submitted that, notice may be issued to enable him to take appropriate instructions in the matter.

5. We are of the view, having regard to the submissions canvassed on either side, that the writ applicant has been able to make out strong prima facie case to have an interim order in his favour so far as the Cash No.066028304000013

*Credit/Current maintained with the AMCO Bank, Ahmedabad is concerned.*

6. *In such circumstances, by way of an interim order, we direct that the provisional attachment of the cash credit account referred to above maintained with the AMCO Bank, Ahmedabad, shall no longer operate. The provisional attachment is ordered to be lifted. The AMCO Bank shall permit the writ applicant to operate the Cash Credit Account referred to above. So far as other two accounts maintained with HDFC Bank Ltd. are concerned, appropriate order shall be passed on the next date of hearing.*

7. *Let Notice be issued to the respondents, returnable on 23.12.2020. No further notice now be issued to the respondents as Mr. Chintan Dave, the learned AGP has already entered his appearance.*

8. *In view of this order passed today, the connected civil application would not survive and stands disposed of accordingly.”*

11. Thus, the provisional attachment of the cash credit account was ordered to be lifted and notice was issued to the respondents so far as the other two accounts, i.e. the current and savings account, referred to above are concerned.

12. Mr.Tushar Hemani, the learned senior counsel appearing for the writ-applicant, vehemently submitted that the impugned order is not sustainable in law as on the date of the passing of the order of provisional attachment, there were no proceedings pending under Section 67 of the Act. He would further submit that the proceedings under Section 67 of the Act are deemed to have come to an end once the process of inspection, search and seizure of the goods, documents, books or things is over and the authorized officer leaves the premises of the taxable person on whose premises the inspection and search is being conducted.

13. According to Mr.Hemani, as on 11<sup>th</sup> August 2020, i.e. the date of the impugned order of provisional attachment, no other proceedings were pending under any other provision of the CGST Act.

14. Mr.Hemani would submit that the impugned orders are very cryptic and those do not reflect any application of mind. He would submit that neither any assessment has been framed so far nor any demand has been raised in the case of the writ-applicant in accordance with the scheme of the Act. He would argue that in the absence of assessment, the quantum of demand cannot be determined precisely and, therefore, the action of attaching the bank accounts for protecting the interest of the Revenue keeping in mind some probable demand which may arise at some point of time in future is absolutely illegal.

15. Mr.Hemani would argue that in accordance with the scheme of the Act, there are two pre-requisites for recovering any amount of tax, interest and penalty from an assessee : first, framing of assessment or re-assessment, and secondly, issuance

of demand notice pursuant to the framing of the assessment or re-assessment. According to Mr.Hemani, indisputably, none of the two conditions are fulfilled in the case on hand.

16. Mr.Hemani would submit that the power under Section 83 of the CGST Act for provisional attachment is very drastic and in such circumstances it is expected of the authority to exercise such powers with due care and circumspection and only upon substantive weighty grounds and reasons. According to him, in the case at hand, the exercise of powers could be termed as arbitrary.

17. Mr.Hemani next submitted that great hardship is being caused to the writ-applicant on account of the provisional attachment of his two bank accounts. All his official transactions are linked to these two bank accounts including his own income-tax return, etc. It is argued that today the writ-applicant is not able to file his income-tax return as the PAN card is attached to these two accounts which are now provisionally attached. He would argue that the writ-applicant cannot even open a new account as, for the purpose of opening a new account, the PAN card is required and once any bank feeds into a PAN card number for the purpose of opening a new account, the data of the provisional attachment of the two bank accounts would be immediately revealed.

18. In the last, Mr.Hemani would submit that the purchases made by the writ-applicant from the concerned parties are absolutely genuine and there is no good ground or reason for the department to doubt such transactions.

19. In such circumstances referred to above, Mr.Hemani, the learned senior counsel, prays that there being merit in his writ-application, the same may be allowed and the impugned order be quashed and set-aside.

20. In support of his submissions, Mr.Hemani, the learned senior counsel, seeks to place significant reliance on the decision of this High Court in the case of Kushal Ltd. vs. Union of India (Special Civil Application No.19533 of 2019, decided on 17<sup>th</sup> December 2019).

21. On the other hand, this writ-application has been vehemently opposed by Ms.Kalpna Raval, the learned senior standing counsel appearing for the respondents. Ms.Raval would submit that the action in the form of provisional attachment of the two bank accounts in exercise of the powers under Section 83 of the Act is just and valid. It is on the basis of the materials on record that the Additional Commissioner, CGST, was convinced that in order to protect the interest of the Revenue it is essential to exercise the powers conferred under Section 83 of the Act for the purpose of provisional attachment of the bank accounts. He would argue that the principal contention on behalf of the writ-applicant that as the proceedings under Section 67 of the Act could be said to have come to an end, the power under Section 83 of the Act for the purpose of provisional attachment of the bank accounts could not have been exercised, is without any merit.

22. Ms.Raval would submit that the decision of this High Court in the case of Kushal Ltd. (supra) has been made a subject matter of challenge before the Supreme Court by filing the

Special Leave to Appeal No.10070 of 2020 and by way of an interim order dated 16<sup>th</sup> November 2020, the Supreme Court has said that the view expressed by this High Court in Kushal Ltd. (supra) should be kept in abeyance and should not be followed in other cases till the issue is finally answered/decided by the Supreme Court.

23. In such circumstances, according to Ms.Raval, the decision of this High Court in the case of Kushal Ltd. (supra) is of no avail to the writ-applicant.

24. Ms.Raval further submitted that it cannot be said that the exercise of discretionary power under Section 83 of the Act is without any material or subjective satisfaction.

25. There is more than a *prima facie* case against the writ-applicant as evident from the original record so as to warrant order of provisional attachment of the bank accounts. She would argue that this Court may not go into the sufficiency of such reasons.

26. In such circumstances referred to above, Ms.Raval prays that there being no merit in this writ-application, the same may be rejected.

27. 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 respondent no.2 committed any error in passing the impugned order of provisional attachment of the bank accounts.

28. Under the scheme of Act, levy and collection of tax are provided for in Chapter III, assessment is under Chapter XII and inspection, search, seizure and arrest are dealt with under Chapter XIV. Chapter XV which deals with the demand and recovery. This chapter provides for the provisional attachment under Section 83. Section 83, under which the power is exercised reads thus :-

*“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 to protect 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.”*

29. Therefore, during the pendency of any proceedings under Sections 62, 63, 64, 67, 73 and 74, the Commissioner can provisionally attach any property including the bank account belonging to the taxable person. For this purpose, the Commissioner has to form an opinion that it is necessary to do so for protecting the interest of the Government Revenue. These steps have to be taken in such manner as prescribed. Rule 159(1) of the CGST Rules, 2017, deals with the provisional attachment of the property. This rule reads thus :-

*“(1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of*

*section 83, he shall pass an order in FORM GST DRC-22 to that effect mentioning therein, the details of property which is attached.”*

30. Rule 159(1) states that when the Commissioner decides to attach any property including the bank account, he shall pass an order in form GST DRC-22. Various forms have been appended to the GST Rules 2017. Form GST DRC-22 lays down the format in which the order has to be issued provisionally attaching the property and the communication thereof to the financial institution. The form is reproduced hereinbelow for ready reference.

*“FORM GST DRC – 22  
[See rule 159(1)]*

*Date:*

*Reference No.:*

*To*

\_\_\_\_\_ *Name*

\_\_\_\_\_ *Address*

*(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 a registered taxable person under the <<SGST/CGST>> Act. Proceedings have been launched against the aforesaid taxable person under section <<\_\_\_\_\_ →> 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. << A/c no. >>;*

*or*

*property located at << property ID & location >>.*

*In order to protect the interests of revenue and in exercise of the powers conferred under section 83 of the Act, I \_\_\_\_\_ (name) \_\_\_\_\_ (designation), 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.*

*or*

*The property mentioned above shall not be allowed to be disposed of without the prior permission of this department.*

*Signature*

*Name*

*Designation*

*Copy to -”*

31. The form of the order shows that it is to be addressed to the taxable person. The sections under which the proceedings

are launched against such a taxable person are to be referred and then a direction is to be issued for not allowing any debit.

32. Section 83 of the Act refers to the pendency of proceeding under Sections 62, 63, 64, 67, 73 and 74 respectively. Section 63 deals with the assessment of unregistered persons. Section 64 is regarding a summary assessment in respect of certain special cases. Section 67 falls in Chapter XIV and refers to the power of inspection, search and seizure. Section 73 is in Chapter XV wherein it deals with the determination of tax not paid or short paid or erroneously refunded or wrongly availed, utilised for any reason other than fraud or any willful mis-statement made on suppression of facts. Section 70 confers power on the proper officer to summon any person whose attendance he considers necessary to give evidence or to produce documents or any other thing in any inquiry. Such inquiry is deemed to be a judicial proceeding under the Indian Penal Code.

33. In *Kushal Ltd.* (supra), a Coordinate Bench of this Court held as under :

*“10. From the facts and contentions noted hereinabove, it emerges that a search came to be conducted under section 67 of the GST Acts on 27.9.2018, whereupon it was discovered that the petitioners had purchased goods and availed input tax credit thereon and had passed on input tax credit to various buyers by raising GST invoices without there being any actual movement of goods at their end either as recipient or as supplier. During the course of*

investigation, it was found that the petitioners were engaged in the business of trading of paper and electronics and had availed GST on the basis of only invoices and no goods were actually received by them. It appears that according to the respondents, investigation pursuant to the search conducted under section 67 of the GST Acts is still going on and therefore, according to the respondents, the proceedings under section 67 of the GST Acts are not yet completed.

11. Section 67 of the GST Acts to the extent the same is relevant for the present purpose reads as under:-

“67 Power of inspection, search and seizure.- (1) Where the proper officer, not below the rank of Joint Commissioner, has reasons to believe that—

(a) a taxable person has suppressed any transaction relating to supply of goods or services or both or the stock of goods in hand, or has claimed input tax credit in excess of his entitlement under this Act or has indulged in contravention of any of the provisions of this Act or the rules made thereunder to evade tax under this Act; or

(b) any person engaged in the business of transporting goods or an owner or operator of a warehouse or a godown or any other place is keeping goods which have escaped payment of tax or has kept his accounts or goods in such a manner as is likely to cause evasion of tax payable under

*this Act, he may authorise in writing any other officer of central tax to inspect any places of business of the taxable person or the persons engaged in the business of transporting goods or the owner or the operator of warehouse or godown or any other place.*

*(2) Where the proper officer, not below the rank of Joint Commissioner, either pursuant to an inspection carried out under sub-section (1) or otherwise, has reasons to believe that any goods liable to confiscation or any documents or books or things, which in his opinion shall be useful for or relevant to any proceedings under this Act, are secreted in any place, he may authorise in writing any other officer of central tax to search and seize or may himself search and seize such goods, documents or books or things:*

*Provided that where it is not practicable to seize any such goods, the proper officer, or any officer authorized by him, may serve on the owner or the custodian of the goods an order that he shall not remove, part with, or otherwise deal with the goods except with the previous permission of such officer:*

*Provided further that the documents or books or things so seized shall be retained by such officer only for so long as may be necessary for their examination and for any inquiry or proceedings under this Act.*

*(3) The documents, books or things referred to in sub-section (2) or any other documents, books or things*

*produced by a taxable person or any other person, which have not been relied upon for the issue of notice under this Act or the rules made thereunder, shall be returned to such person within a period not exceeding thirty days of the issue of the said notice.”*

12. *In the present case, since the premises of the petitioners came to be searched, the provisions of sub-section (2) of section 67 of the GST Acts would be attracted. In terms thereof, pursuant to an authorisation issued in this behalf, the proper officer may search the premises in respect of which the search is authorised and seize goods, documents or books or things and retain the documents or books or things so long as may be necessary for any inquiry or proceedings under the Act. In the present case, search proceedings were conducted at the premises of the petitioners on 27.9.2018. Thereafter, there was a visit by the respondents on 1.4.2019 which led to the arrest of the second petitioner. Thereafter, no search has been conducted at the premises of the petitioners. The search proceedings have, therefore, ended. It is the case of the respondents that proceedings under section 67 of the GST Acts are not yet completed and the matter is still under investigation. In the opinion of this court, it may be that pursuant to the search, inquiry or other proceedings under the Act may have been undertaken; however, such inquiry or other proceedings are not under section 67 of the GST Acts and hence, it cannot be said that any proceedings are pending under section 67 of the GST Acts.*

13. *In this case, the orders of provisional attachment have been made under section 83 of the GST Acts which 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 sub-section (1).*

14. *On a plain reading of section 83 of the GST Acts, it is clear that a sine qua non for exercise of powers thereunder is that proceedings should be pending under section 62 or section 63 or section 64 or section 67 or section 73 or section 74 of the GST Acts. In the present case, the proceedings under section 67 of the GST Acts are no longer pending and pursuant to the search, proceedings under any of the other sections mentioned in section 83 have not been initiated. Under the circumstances, on the date when the orders of provisional attachment came to be made, the basic requirement for exercise of powers under section 83 of the GST Acts was not satisfied. The provisional attachment of*

*the bank accounts of the petitioners under section 83 of the GST Acts is, therefore, not in consonance with the provisions thereof and cannot be sustained.*

16. *As discussed hereinabove, in the absence of pendency of any proceedings under sections 62, 63, 64, 67, 73 or 74 of the GST Acts, the orders of provisional attachment of the bank accounts of the petitioners under section 83 of the GST Acts are without authority of law and are rendered unsustainable.”*

34. Thus, this Court took the view that the *sine qua non* for exercise of powers under Section 83 of the Act is that the proceedings should be pending under Section 62 or Section 63 or Section 64 or Section 67 or Section 73 or Section 74 of the GST Act. The Coordinate Bench, in the said case, took the view that as no proceedings under Section 67 of the Act were pending on the date of the passing of the order of provisional attachment, the same would render the order illegal and contrary to the provisions of the Act, more particularly, Section 83 of the Act.

35. We shall now look into the order passed by the Supreme Court referred to above. The order reads thus :

*“Heard learned counsel for the parties.*

*On the question of interim relief, we agree with the apprehension expressed by the petitioner-Union of India that the impugned judgment being followed in other similar*

*cases cannot be ruled out. That ought not to be permitted as the issue is pending consideration before this court.*

*In other words, the view expressed in the impugned judgment is kept in abeyance and it cannot be followed in other cases till the issue is finally answered/decided by this Court.*

*List this matter after two weeks.*

*Reply affidavit, if any, be filed, in the mean time.”*

36. Thus, the Supreme Court has kept the view expressed by this Court in Kushal Ltd. (supra) in abeyance and has further clarified that the same should not be followed in other cases till the issue is finally answered/decided by the Supreme Court.

37. In view of the aforesaid, we refrain ourselves from going into the argument of Mr.Hemani as regards the pendency of the proceedings under Section 67 of the Act on the date of the passing of the order of provisional attachment under Section 83 of the Act.

38. We now proceed to consider the legality and validity of the action on other grounds as raised on behalf of the writ-applicant.

39. A Coordinate Bench of this Court, to which one of us (J.B.Pardiwala, J.) was a party and also the author of the

judgment in the case of Valerius Industries vs. Union of India (Special Civil Application No.13132 of 2019, decided on 28<sup>th</sup> August 2019), had the occasion to look into the position of law as regards the scope and exercise of powers under Section 83 of the Act. We may quote the relevant observations thus :

*“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 pre-condition 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 sub-clauses (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 sub-clauses. 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 sub-clauses (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 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.”*

*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 far-fetched, 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.”*

40. This Court summarised its final conclusion in paragraph 52 of the said order 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 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. ”*

41. In the course of the hearing of this matter, we inquired with Mr.Hemani as regards the balance in the two bank accounts ordered to be provisionally attached. The details furnished by Mr.Hemani are as under :

Sr. No.	Account No.	Account Type	Balance
1	02372320002872	Current	17,065=00
2	02371000038487	Saving	5,000=00

42. Thus, the amount as on date in the two bank accounts aggregates to Rs.22,065=00. What good purpose the department is going to achieve by provisionally attaching the two bank accounts with balance of a paltry amount of Rs.22,065=00.

43. Let us try to take a practical view of the matter. The avowed object of exercise of power under Section 83 of the Act for the purpose of provisional attachment of any property is to protect the interest of the Revenue. Say for instance, tomorrow an order of assessment is passed and liability of the assessee to pay a particular amount is fixed. It is at that stage that the

department may consider recovering the amount determined towards the tax liability from the amount lying in the bank accounts. In the same manner, if any immovable property has been provisionally attached and final liability towards the payment of tax is fixed under the order of assessment, then such immovable property can be put to auction for the purpose of recovering the dues. In the case on hand, we do not propose to interfere with the investigation already undertaken by the department. Ultimately, if sufficient material surfaces indicating the involvement of the writ-applicant in some bogus transaction, the next step in the process can always be a show-cause notice under Section 73 or Section 74 of the Act, as the case may be. However, to provisionally attach all the bank accounts and that too those accounts in which there is hardly any balance would only cause undue hardship to the assessee. This is the grey area where the Revenue or the authority concerned needs to apply its mind before the power is exercised. This is the reason why in Valerius Industries (supra) this Court observed that the considerations are altogether 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 of the Act by itself may not be sufficient to arrive at the subjective satisfaction that it is necessary to provisionally attach the property for the purpose of protecting the interest of the Government Revenue. 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.

44. The expression 'is of the opinion' or 'has reason to believe' as noted above are of the same connotation and are indicative of the subjective satisfaction of the Commissioner, which depends upon the facts and circumstances of each case. It is settled law that 'opinion' must have a rational connection with or relevant bearing on the formation of the opinion. The rational connection postulates that there must be a direct nexus or live link between the protection of interest and available property which might not be available at the time of recovery of taxes after the final adjudication of the dispute. The opinion must be formed in good faith and should not be a mere pretence. The courts are entitled to determine whether the formation of opinion is arbitrary, capricious or whimsical. The expression 'necessary' must also be taken care of. From the order and record, it must come out that actually it was necessary to take drastic action of provisional attachment.

45. We may remind the respondents once again of the observations made by a Coordinate Bench of this Court in the case of M/s.Patran Steel Rolling Mill vs. Assistant Commissioner of State Tax, Unit 2, rendered in the Special Civil Application No.16931 of 2018, decided on 20<sup>th</sup> December 2018. We quote the relevant observations thus :

*“7. Sub-section (1) of Section 83 of the GGST Act provides that where 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. On a plain reading of the said provision, it is evident that before resorting to such*

*drastic action, the Commissioner is required to form an opinion that it is necessary to do so to protect the interest of the revenue. For the purpose of arriving at such an opinion, the Commissioner should first form an opinion that the petitioner would not be in a position to pay the tax dues after the assessment proceedings are over. In the facts of the present case, the petitioner firm is a going business and the petitioner has readily deposited a sum of Rs.17,00,000/- which covers more than the tax liability that may be assessed. It is not the case of the respondents that the petitioner is a fly by night operator or that it does not have the means to pay the dues that might to assessed at the end of assessment proceedings, which at present have not even been commenced. There is nothing to show that the respondents would not be in a position to recover any amount that the petitioner may ultimately be held liable to pay. In these circumstances, without recording any such satisfaction, the respondent could not have formed the opinion that it was necessary to resort to provisional attachment to protect the interest of the Government revenue. The impugned order of attachment, therefore, cannot be sustained. It is clarified that the fact that the petitioner has deposited a sum of Rs.17,00,000/- during the course of the search proceedings shall not be construed as an admission of such dues on the part of the petitioner.*

8. *Before parting, the court deems it fit to caution the concerned authorities that while exercising powers under Section 83 of the GGST Act, the authorities should try to balance the interest of the Government revenue as well as a dealer to ensure that while the interest of the revenue is*

*safeguarded, the dealer is also in a position to continue with his business, because it is only if the dealer continues with the business that he would generate more revenue. The authorities should keep in mind that bringing the business of a dealer to a halt does not in any manner serve the interest of the revenue. Therefore, while taking action under Section 83 or 67(2) of the GGST Act, the concerned authorities should take care to ensure that equities are maintained and while securing the interest of the revenue, they should attempt to see that the dealer is in a position to continue with the business. This court does not intend to lay down any absolute proposition that in no case drastic action should be taken, but that the respondents should consider the background and history of the dealer as well as his financial position to ascertain as to whether or not he would otherwise be in a position to pay the dues that may be assessed upon the culmination of any assessment proceedings that may be initiated. If the dealer is a fly by night operator or a habitual offender or does not have sufficient means to pay the dues that may arise upon assessment, such action may be justified. Such drastic powers under Section 83 of the Act should not be exercised as a matter of course, but only after due application of mind to the relevant factors.”*

46. We may also remind the respondents of the observations made by a Division Bench of the Punjab and Haryana High Court in the case of Bindal Smelting Private Limited vs. Additional Director General (CWP No.31382 of 2019, decided on 20<sup>th</sup> December 2019). We quote the relevant observations thus :

*“We are of the opinion that Respondent can attach an account only if there is some balance in the form of FDR or savings. The power of attachment of bank account cannot be exercised as per whims and caprices of the Authority. The Commissioner is bound to ensure that by attachment of property or bank account, interest of revenue is going to be protected. In case a property is mortgaged with bank and value of property is less than outstanding dues of bank, provisional attachment is meaningless and action remains only on paper. In the absence of record showing that interest of revenue is protected by attaching property or bank account, action deserves to be declared as taken without application of mind and formation of opinion on the basis of cogent material. Thus, attachment of current account having debit balance does not protect interest of revenue, instead merely ruins the business of a dealer. Such an action of attachment of "over cash credit" account for the sake of recovery of confirmed demand, may in some peculiar case, may be still permitted but not at the stage of pending investigation.”*

47. 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 Income-Tax 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 Income-Tax 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 a 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 of its subsidiaries or any bank as may be appointed by the Reserve Bank of India as its agent under the provisions of sub-section (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 provision 13, the expression "scheduled bank" shall mean a bank included in the Second Schedule to the Reserve Bank of India Act, 1934."*

48 . In the aforesaid context, we may quote Halbury's Laws of India (Direct Tax II, Vol 32), 2nd Edn :

*“Halbury's Laws of India (Direct Tax II, Vol 32), 2nd Edn.*

#### *7. Miscellaneous*

*This provision relating to making an attachment before judgment, i.e, 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 far-reaching 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 order of demand directing assessee to deposit entire demand within seven 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 fit 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.”*

49. 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.

50. In the overall view of the matter, more particularly, having regard to the fact that there is hardly a balance of Rs.22,065/- in the two bank accounts, we see no good reason to continue the provisional attachment.

51. In the result, this writ-application succeeds and is hereby allowed. The impugned order of provisional attachment of the two bank accounts is hereby quashed and set-aside. The connected Civil Application would not survive and the same is disposed of accordingly.

52. It is clarified that this order shall have no bearing on the further proceedings that the authority may deem fit to initiate in accordance with law.

53. We have noticed over a period of time that in each and every matter in which proceedings under Section 67 of the Act

are initiated, an order of provisional attachment of the bank accounts under Section 83 of the Act would follow. This mechanical exercise of the power is not appreciated. The Legislature has thought fit to confer upon the authority the power to provisionally attach the property of the assessee in the hope that such power is not exercised casually but, only after due and proper application of mind. A mechanical or casual exercise of such power will dilute the very efficacy of the provisions of Section 83 of the Act. Every day there are not less than ten matters on the subject of Section 83 of the Act in the cause-list. When there are plethora of judgments explaining Section 83 of the Act in details, then why so much of litigation in the High Court. The only reason that can be attributed is the mechanical exercise of power under Section 83 of the Act. This should stop at the earliest. So much judicial time is wasted in all such matters wherein the law is so well settled.

54. The registry is directed to forward one copy each of this judgment to the Principal Secretary, Finance Department, Union of India, New Delhi, and also to the Chairman of the CBDT, New Delhi, at the earliest.

55. We request the Union of India as well as the CBDT to read this judgment thoroughly and consider issuing appropriate instructions or guidelines at the earliest with respect to the exercise of power under Section 83 of the Act, 2017.

**(J. B. PARDIWALA, J.)**

**(ILESH J. VORA, J.)**

/MOINUDDIN