IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8573 OF 2015

Zamil Steel Buildings India
Pvt Ltd ..Petitioner

Vs.

The State of Maharashtra and Others ..Respondents

Mr. V. Sridharan, Senior Counsel a/w Mr Prakash Shah, Mr Jas Sanghavi, Mr Rahul Thakkar, Mr Puneet Ganapathy i/b P. D. S. Legal,for the Petitioner.
Mr. Vikas Mali, AGP,for Respondent No.1.
Mr V. A. Sonpal, Special Counsel for Respondent Nos.2 and 3.

CORAM :- **S.C. DHARMADHIKARI & B.P. COLABAWALLA, JJ.**
DATE :- **AUGUST 25, 2015.**

P. C.:

This Petition is taken out of turn on account of the urgency pointed out, namely, that by order at Exhibit-A to the Writ Petition pages 33 to 36, the Joint Commissioner of Sales Tax, VAT

Administration, Pune Division Pune, has attached provisionally the bank accounts of the Petitioner/dealer for the alleged tax liability of Rs.45,35,65,266/-. The bank details are as under:-

Sr No.	Name of Bank/ Debtor	Branch Address/Address	A/c No./Type
1	HK and Shanghai Bank	Bund Garden Road Branch	105-630032-001
2	Standard Chartered Bank	Kalyani Nagar Branch	222-0-533287-7
3	Bank of Bahrain & Kuwait B. S. C.	Nariman Point branch,	11010191500001
4	IDBI Bank Ltd	Pride House, Ganeshkhind	390103000001045
5	HDFC Bank Ltd	Koregaon Park branch	50200001320520
6	IDBI	Andheri Link Rd. Mumbai	0174102000008587
7	IDBI	KalkajiBranch, New Delhi	0901102000022701
8	IDBI	N. G. Road, Cochi, Cochin	0084102000020730
9	IDBI	BanjaraHills, Hyderabad br.	028102000015358
10	IDBI	NelsonManickum Rd. Chennai br.	045102000029962
11	IDBI	NelsonManickum Rd. Chennai br.	045102000016694
12	IDBI	Mission Road, Banglore	008102000044101

2 The order directs that the amounts shall remain provisionally attached until further orders. Any amount shall not be paid, unless this order is withdrawn or communication to that effect is made by the Joint Commissioner of Sales Tax,(VAT Administration) Pune. Further stipulations in the order are to be found at page no.35. The order further directs that if any such payment is made, such a person shall be personally held liable to the Commissioner of Sales Tax, Maharashtra State, Mumbai and the said amount shall be recovered as an arrears of land revenue as per the provisions of Maharashtra Land Revenue Code, 1966 and appropriate legal action will be initiated as per the provisions of law. The dealer shall however, be at liberty to produce any documents, papers or books of accounts and appear before the Joint-Commissioner of Sales Tax (VAT Administration) Pune in-person within 15 days from the service of this order to justify the withdrawal of this order, failing which this order shall be absolute. This order is to remain in operation for 12 months from the date of service on the dealer and may be extended further from time to time for a period of two years.

3 By consent of parties, this Petition is taken up for hearing and final disposal. Respondents through counsel waive service.

The Petitioner is a Private Limited Company incorporated under the Indian Companies Act, 1956 and has its registered office at the address mentioned in the cause title. The Petitioner is a registered dealer under the Maharashtra Value Added Tax Act, 2002 (for short "MVAT Act,2002). Respondent Nos.1 to 3 are the State of Maharashtra and their officers exercising statutory powers and discharging their functions in terms of the MVAT Act, 2002.

4 After setting out as to how the Petitioner is a manufacturer of the product, in paragraph 4, it is stated that the Petitioner has one registered office in Kharadi and a factory both in Pune. The Petitioner has been filing returns and discharging due liability under the MVAT Act, 2002 since 2007-2008. The Petitioner is pointing out as to how the activity is based on the customer and geographical requirements and that a particular process is

undertaken. The Petitioner's product which is styled as “rigid frame steel structures”, involves a particular configuration of various steel components, commonly and collectively referred to as “Pre-Engineered Buildings”. The components are supplied to the customers in a completely knocked down condition. The customers have an option to get these materials installed and erected by either the Petitioner or any third party. The Petitioner had been collecting the VAT from its customers until the year 2011 at the rate of 12.5.% on account of rigid frame columns and rafters and remitting the same to the Revenue. On the rest of the products, the Petitioner had been collecting VAT from its customers at the rate of 4 or 5%, as applicable, and remitting the same to the Revenue. There was no dispute with the Revenue until the financial year 2010-2011. The Petitioner thereafter relying upon a judgment of the Rajasthan High Court started charging VAT at the rate of 5% and not 12.5% on rafters and rigid frame columns.

5 The Petitioner also invoked the procedure for determination of disputed question (DDQ) under the MVAT

Act,2002 for one of the products supplied by it i.e. rigid frame columns. The Petitioner applied to the Commissioner of the Sales Tax by DDQ application dated 11th August, 2010. Annexure-C to this Writ Petition, is a copy of this DDQ application. There is an order passed by the Commissioner on 9th July, 2013 holding that the rigid framed columns do not fall under the entry claimed by the Petitioner, and therefore, liable to be taxed at the residual rate of 12.5%. Against this order, an Appeal was filed by the Petitioner in 2013 itself and it is common ground that this Appeal is pending before the Maharashtra Sales Tax Tribunal.

6 A search and seizure notice was issued on 10th August, 2015, and records and information as requested by the Sales Tax Department came to be produced. Some of the documents were seized. The seized documents are stored in the Petitioner's premises but with a seal. The statements of the various employees of the Petitioner were recorded, and thereafter, the Petitioner was called upon to produce all books of accounts since 1st April, 2011. Thereafter, the Petitioner was required to appear before the Joint

Commissioner, but before the Petitioner could prepare itself and meet the case as set up by the Revenue, the Petitioner was informed by the bankers on 24th August, 2015 that there is a communication from the department attaching their bank accounts.

7 It is in that context and disputing the findings in the impugned order that this Petition has been filed and an urgent application was made so as to release the bank accounts from the attachment.

8 Mr Sridharan, learned Senior counsel appearing for the Petitioner submitted before us that the order passed does not take into account that the Petitioner is a solvent company having sufficient assets in the State of Maharashtra. The Petitioner, therefore, cannot be proceeded against on the footing that the interests of the Revenue are jeopardized or that they are not secure and safe because the Petitioner may not discharge the liability eventually. Mr Sridharan submits that the Petitioner directly and indirectly employs a workforce of approximately 1200 persons and

the audited balance-sheet of the Petitioner as of 31st December, 2014 is relied upon in that regard.

9 Further, it is contended that the Petitioner has fully cooperated in the investigation and that the order of the nature contemplated by Section 35 has to be passed only subsequent to the assessment order. In the present case, there is no warrant for passing of any order in August, 2015 when the DDQ by the Commissioner has been done nearly two years back and appeal from the determination order is pending before the Tribunal. Thus, there are no extraordinary circumstances which required the Revenue to take recourse to Section 35 of the MVAT Act, 2002. Therefore, this action is clearly arbitrary and illegal, is the submission of Mr Sridharan.

10 Mr Sonpal, learned special counsel appearing for Respondent Nos. 2 and 3, on the other hand, invited our attention to Section 35 of the MVAT Act, 2002 and submitted that the power to provisionally attach the monies/assets is exercised in order to

protect the Revenue. In the present case, the Joint Commissioner, on being satisfied that, it was necessary to protect the interests of the Revenue, provisionally attached, by an order in writing, any money due or which may become due to the dealer from any other person or any money which any other person holds or may subsequently hold for or on account of dealer in this case. Thus, the power, authority and jurisdiction of the Joint Commissioner has not been challenged. If any order has been passed under sub-section(1) and served, then, by sub-section (5) of Section 35 there is remedy provided and the Commissioner may modify or cancel that order. An Appeal against such an order shall lie to the Tribunal. Hence, Mr Sonpal, would submit that the Writ Petition should not be entertained and in any event it should not be entertained so as to prevent the Joint Commissioner from protecting the interest of the Revenue. The Joint Commissioner is satisfied that this dealer may not be in a position to discharge the liability in the event of their loss in the Appeal before the Tribunal. The dealer is seeking to question the action of the Revenue belatedly in 2011 and raised a frivolous dispute which has been determined by the Commissioner. In the teeth of such overwhelming adverse material, the Petitioner cannot be heard to say that the Joint Commissioner could not have acted in order to protect the interest of the Revenue, was the submission of Mr Sonpal. He therefore submitted that, on merits as well, this Writ Petition be dismissed.

11 Alternatively and without prejudice, Mr Sonpal submits that if this Court is inclined to vacate the impugned order and set aside the same, then, the Petitioner be called upon to furnish bank guarantee to the satisfaction of the Revenue/Department so as to protect its dues.

12 With the assistance of the learned counsel appearing for both sides, we have perused the Petition and all its Annexures. We have perused Section 35 of the MVAT Act,2002. That Section reads as under:-

> "35. **Provisional attachment to protect revenue in certain cases:**
>
> *(1) If during the course of inquiry in any proceedings including*

proceedings related to recovery of any amount due, in respect of any person or dealer or during any inspection or search in relation to the business of any person or dealer under this Act, the Commissioner is of the opinion that for the purpose of protecting the interests of the revenue it is necessary so to do, then he may, notwithstanding anything contained in any law for the time being in force or any contract to the contrary, attach provisionally by order in writing any money due or which may become due to such person or dealer from any other person or any money which any other person holds or may subsequently hold for or on account of such person or dealer:

***Provided that**, the Commissioner shall specify in his order the amount of money to which the order applies:*

***Provided further that,** the Commissioner may, by an order, revoke such order, if the dealer furnishes, to the Commissioner, a bank guarantee, in such time, for such period, as may be specified, in the said order.*

(2) Every such provisional attachment shall cease to have effect after the expiry of a period of one year from the date of service of the order issued under sub-section (1):

***Provided that**, the Commissioner may, for reasons to be recorded in writing, extend the aforesaid period by such further period or periods as he may think fit, so, however that the total period of extension shall not in any case exceed two years.*

(3) The powers under this section shall be exercised by the Commissioner himself or the Additional Commissioner having jurisdiction over the entire State or, as the case may be, by any Joint Commissioner to whom the Commissioner has delegated such powers by a notification published in the Official Gazette.

(4) Where an order under sub-section (1) is served upon any person, provisionally attaching any money, then, such person shall be personally liable, so long as the attachment order is not revoked or has not ceased to have effect, to pay to the Commissioner, the amount of money so attached.

> *(5) If the said person or the dealer makes an application in the prescribed form to the Commissioner within fifteen days of the date of service of the order specified in sub-section (1), or as the case may be, within fifteen days of the date of service of the order extending the period under sub-section (2), then the Commissioner, after affording such person or dealer a reasonable opportunity of being heard, and, having regard to the circumstances of the case, may confirm, modify or cancel the order.*
>
> *(6) An appeal against any order passed under sub-section (5) shall lie with the Tribunal and all other provisions of section 26 shall apply accordingly."*

13 For any action in terms of this section to be taken, firstly there ought to be an inquiry in any proceedings including the proceedings relating to recovery of any amount due. Secondly, that ought to be in respect of any person or dealer. Thirdly, during any inspection or search in relation to any business of any person or dealer under the MVAT Act, 2002, the Commissioner ought to form an opinion that for the purpose of protecting interest of the Revenue, it is necessary to pass an attachment order provisionally. Foundation for the action thus, is the recovery of the amount due and the opinion of the Commissioner that for the purpose of protecting interest of the Revenue, this drastic action is needed. It is not an absolute power and which could be exercised without recording the requisite opinion and on the above material counts. In the present case, we are not impressed by the argument of Mr Sonpal that the Petitioner can be relegated to the remedy provided by sub-section 5 of Section 35 and that is of making an application

to the Commissioner for modifying or cancelling the order at Exhibit-A. We are also not satisfied that in the given facts and circumstances, this Court should not exercise its discretion in favour of the Petitioner and relegate it to the alternate remedy, as it is well settled that the existence of an alternate remedy is not an absolute bar against entertaining a Writ Petition under Article 226 of the Constitution of India. It is more a rule of caution and prudence rather than a legal bar. Therefore, whether the Petitioner should be relegated to the alternate remedy, is a matter left to the discretion of the Court exercising powers under Article 226 of the Constitution of India. Considering the impact of the impugned order and the drastic consequence thereof, we do not think that the Petitioner should be relegated to the remedies suggested by Mr Sonpal. They are hardly efficacious in the present case.

14 Further, upon perusal of the impugned order, we find that the Petitioner is proceeded against because in the opinion of the Joint Commissioner, it was reported to him that the proceedings under Section 64 of the MVAT Act, 2002 are in progress. Those proceedings, on the own showing of the Joint Commissioner, pertain to production and inspection of accounts and documents and search of premises. On the date of the impugned order these proceedings were in progress. Thereafter, the Joint Commissioner proceeds to verify the records and holds that the dealer has misclassified its product and sold it at an incorrect tax rate. This

was the discrepancy noticed during the course of the investigating visit. According to him, the dealer has failed to act as per the provisions of law. We find absolutely no reference made by the Joint Commissioner to the admitted and undisputed factual position, namely, since 2011 the Petitioner entertained the doubt about the rate at which tax is to be levied and collected, and therefore, requested the Commissioner to determine a disputed question and issue. That determination ended in an order dated 9th July, 2013 adverse to the Petitioner. However, this order is challenged in Appeal before the Tribunal and that Appeal is pending. In such circumstances, and that the dispute being as old as 2011, coupled with the fact that the Commissioner's order is of 9th July, 2013 and against which an Appeal has been preferred by the Petitioner in the Tribunal which is pending since September 2013, then, we do not see what was the occasion to exercise the powers under Section 35. It may be that a search of the premises was conducted and that production and inspection of accounts and documents was directed, and thereafter, the same came to be referred to, but by that itself, and without making any reference to the debatable issues, we do not think that the Commissioner was justified in exercising his powers. There is no basis for holding that the dealers' credentials are doubtful and if coercive action is not initiated immediately, then, the dealer may not discharge the said liability to the exchequer. How or why such an apprehension was not raised from 2011 till date, has not been clarified at all. What was the occasion to act in terms of Section 35 on 21st August 2015, has not been also explained beyond referring to the action under Section 64 of the MVAT Act, 2002. We do not think that the Commissioner needed to exercise this power in order to protect the interest of the Revenue. If the Joint Commissioner was of the opinion that revenue involved is to the tune of more than Rs.45 Crores, and that is required to be secured, then, he could have ensured security of the same by appropriate proceedings including by an Application in the pending Appeal. That Authority could have obtained an undertaking and thereby ensuring that the assets and properties are not frittered away or disposed of. The Petitioner appears to be readily willing to make a statement that the factory building, plant and machinery are unencumbered, and therefore, there appears to be no apprehension that their present value would not be adequate to secure the Revenue. Its book value, according to the Petitioner, is approximately Rs.100 Crores.

15 Learned Senior counsel for the Petitioner, on instructions, states that the Petitioner is ready and willing to make a statement that unless and until the proceedings under the Act including an Appeal preferred by the Petitioner is disposed of, it would not create any third party right, part with possession of the assets and properties including the above plant and machinery and building. However, that should not prevent the Petitioner from utilizing the same in the ordinary and normal course of business.

16 We are of the opinion that the statements made by the learned Senior Counsel, on instructions, are enough to protect the interest of the revenue at this stage. There is no need of continuing the provisional attachment ordered by the Joint Commissioner vide Exhibit-A to the Petition.

17 By accepting the statement made by the learned Senior Counsel as an undertaking given to the Court and directing that movable and immovable Assets and properties of the Petitioner shall not be disposed of, transferred and no third party interest of any nature created therein nor their possession shall be parted with during the pendency of the proceedings under MVAT Act, 2002, as noted above, we set aside the impugned order. Ordered accordingly.

18 We clarify that our order and direction shall not prevent the Petitioner from utilizing all movable and immovable properties and assets in the ordinary and normal course of business.

19 The bank accounts and which are the subject matter of the provisional attachment order are forthwith released and de-freezed. The Petitioner is free to operate these bank accounts as well in the ordinary and normal course of business. However, our order and direction shall not prevent or preclude the Revenue from passing the assessment order in accordance with law and equally

our order and direction shall not preclude the parties from raising all contentions in the pending appellate proceedings. All such contentions of both sides are kept open. Needless to clarify that having expressed no opinion on the merits of the controversy, this order and direction shall not influence the Tribunal while deciding the Appeal of the Petitioner.

20 The Writ Petition is accordingly allowed in the above terms. No order as to costs.

21 This order is passed in the presence of Mr Alakesh Roy, Managing Director of the Petitioner who is before us in this Court. We also record the statement of Mr Sonpal that the Revenue/ Department will pass the requisite assessment order in accordance with law and after giving all prior opportunities of hearing to the Petitioner within a period of three months from today. Needless to clarify that the Petitioner will cooperate with the Department in early conclusion of assessment proceedings by not seeking unnecessary adjournments.

(B. P. COLABAWALLA, J.) **(S. C. DHARMADHIKARI, J.)**