

**HON'BLE SRI JUSTICE SANJAY KUMAR  
AND  
HON'BLE SRI JUSTICE P. KESHA RAO**

**WRIT PETITION No.3017 of 2018**

**ORDER:** (Per the Hon'ble Sri Justice P. Keshava Rao)

Heard the learned counsel for the petitioner as well as the learned Senior Standing Counsel for the Income Tax Department.

The prayer sought in the writ petition is as under:

“... .. to issue an appropriate writ or direction, more particularly one in the nature of writ of certiorari by calling for records pursuant to order passed by 3<sup>rd</sup> respondent vide PAN:AAHCR0494 B/W-4(1)/VSP/281B/2017-18 dated 28.12.2017 declaring the same as illegal, contrary to the provisions of Income Tax Act, 1961, in violation of principles of natural justice besides being violative of Articles 14 and 19(1)(g) of the Constitution of India and quash the same and pass such order or orders as may deem fit and proper in the facts and circumstances of the case.”

The facts of the case are that the petitioner is a Company incorporated under the Provisions of the Companies Act, 2013 on 11.09.2014, engaged in the business of real estate i.e. purchasing lands and developing them by forming layouts, selling plots and undertaking constructions. The petitioner Company has been assessed to the income tax and filing the returns from the Assessment Year 2015-16 onwards. During the course of its business, the petitioner has purchased lands admeasuring to an extent of Ac.45.00 cents during the Assessment Year 2015-16 and an extent of Ac.17.84 cents during the Assessment Year 2016-17 i.e. in toto Ac.62.84 cents situated at Bhalighatam Village,

Kothavalasa Mandal, Vizianagaram District of Andhra Pradesh.

As far as the Assessment Year 2015-16 is concerned, the petitioner Company acquired Ac.45.00 cents and incurred expenditure for development of the land and accordingly filed return of the Income for the Assessment Year 2015-16 on 23.02.2017 showing the total income as 'nil' and stated in the books of account that the aggregate of the cost of the land purchased and cost of the development as work in progress under stock in trade. Thereafter, the petitioner Company sold 61 plots during the Assessment Year 2016-17 and filed the income tax return for the Assessment Year 2016-17 on 24.02.2017 duly disclosing the income at Rs.13,13,023/- and paid self-assessment tax of Rs.4,60,832/- on 10.10.2016. The return filed by the petitioner Company came under the scrutiny under Section 143(2) of the Income Tax Act, 1961 (for short, "the Act, 1961") leading to execution of a warrant under Section 133A and a survey was conducted on 23.03.2017 by the Income Tax Officer (Inv), Unit-III. During the survey proceedings, the petitioner Company voluntarily offered an amount of Rs.1,50,00,000/- under the Pradhan Mantri Garib Kalyan Yojna (PMGKY)-2016 Scheme and the same was deposited in cash and agreed to pay necessary tax, besides offering an amount of Rs.3,50,00,000/- as income under normal provisions for the Assessment years 2016-17

and 2017-18. However, due to paucity of funds, the petitioner Company could deposit only Rs.80,00,000/- under PMGKY Scheme which was lapsed on 31.03.2017 duly paying necessary taxes of Rs.40,00,000/- and depositing an amount of Rs.20,00,000/- as required under the PMGKY Scheme on 30.03.2017. The petitioner Company also filed a revised return of Income for the Assessment Year 2016-17 on 30.10.2017 and original return of income for the Assessment Year 2017-18 on 01.11.2017 offering a total income of Rs.3,50,00,000/- for the Assessment Years 2016-17 and 2017-18 and paid an amount of Rs.1,34,00,000/- towards taxes. It is also stated that the petitioner Company sold 291 plots during the previous year relevant to Assessment Year 2017-18. However, to the utter surprise of the petitioner Company, the 3<sup>rd</sup> respondent issued the provisional attachment order under Section 281B of the Act, 1961, vide PAN:AAHCR0494 B/W-4(1)/VSP/281B/2017-18 dated 28.12.2017 attaching the entire extent of the property purchased by the petitioner through various sale deeds. The 3<sup>rd</sup> respondent also requested the Sub-Registrar, Kothavalasa, not to entertain any further registrations over the properties mentioned supra. The petitioner also stated that as on the date of provisional attachment out of the total number of 621 plots in the first four phases, 480 plots were sold and around 141 plots are unsold with an approximate area of 37,050 square yards. The petitioner Company is also in the process

of developing an extent of Ac.12.35 cents forming part of Phase V with approximate developed area of 40,000 square yards/250 plots and will obtain layout permission subsequent to completion of development.

It is the further case of the petitioner that the 3<sup>rd</sup> respondent passed an assessment order on 29.12.2017 for the assessment year 2015-16 under Section 143 of the Act, 1961 determining a sum of Rs.1,09,57,120/- on the grounds of furnishing inaccurate particulars of income. Against the same, the petitioner company preferred an appeal before the Commissioner of Income Tax (Appeals-I) by depositing 20% of the demanded amount in compliance with the modified guidelines dated 31.07.2017 issued by the Central Board of Direct Taxes (CBDT) for stay of recovery of the proceedings. In the meanwhile, the 3<sup>rd</sup> respondent issued proceedings vide PAN:AAHCR10494 B/W-4(1)/VSP/281B/2017-18 dated 28.12.2017 addressing to the Sub-Registrar, Kothavalasa, Vizianagaram District and the Sub-Registrar, Rajahmundry, East Godavari District, requesting them not to transfer the plots belonging to the petitioner company mentioned in the attachment order. The petitioner company submitted its representation to the 3<sup>rd</sup> respondent on 24.01.2018 stating that the assessment under consideration is the first assessment year for the petitioner company and there are no tax dues relating to earlier years and it has co-operated with

the respondents during the entire assessment and survey proceedings. It was also mentioned in the said representation that the petitioner company preferred an appeal before the Commissioner of Income Tax (Appeal) and the same is pending. In these circumstances, the present writ petition is filed challenging the impugned proceedings dated 28.12.2017 on the following grounds:

- 1) The learned counsel appearing for the petitioner company would contend that the impugned proceedings passed by the 3<sup>rd</sup> respondent is ex facie illegal as the same does not contain any reasons as to why the order of attachment of the property is passed under Section 281 B of the Act, 1961. It is further contended that what made the 3<sup>rd</sup> respondent to apprehend that the petitioner may dispose of the property to defeat the tax payment is also not mentioned.
- 2) Since the petitioner company is engaging the business of real estate i.e., purchasing the land and converting the same into layouts and selling the plots, the same is nothing but stock in trade under the provisions of the Act, 1961, which cannot be attached.
- 3) The prior approval of the Commissioner said to have obtained by the 3<sup>rd</sup> respondent was not served on the petitioner and in the process the petitioner company is not aware of the details of the said approval since the same are not mentioned in the impugned proceedings which give rise to a suspicion about the existence of such approval.

- 4) The 3<sup>rd</sup> respondent should have formed an opinion on the basis of some material for passing the impugned proceedings in order to protect the interest of the revenue and such material information is lacking.
- 5) The power conferred on the 3<sup>rd</sup> respondent under Section 281 B of the Act, 1961, is a very drastic and having far reaching consequences and therefore should be used sparingly on substantive weighty grounds and reasons. In fact, the petitioner all through cooperated with the respondents during survey and assessment proceedings and paid substantial amounts towards tax. Therefore, he sought to set aside the impugned proceedings on the ground of violation of principles of natural justice under Articles 14 and 19(1)(g) of the Constitution of India.

To support his contentions, the learned counsel for the petitioner relied on the judgment of this Court in **Society for Integrated Development in Urban and Rural Areas v. Commissioner of Income-Tax and another**<sup>1</sup>. Basing on the said judgment, the learned counsel attempted to substantiate his contention that the provisions of Section 281 B of the Act, 1961, should be sparingly used since it has got a drastic effect on the assessee in the form of attachment and the 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

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<sup>1</sup> (2001) 252 ITR 642 (AP)

be raised on completion of assessment. Therefore, it should be exercised with extreme care and caution and also should be exercised if there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of the whole or any part of his property with a view to thwarting the ultimate collection of the demand.

Per contra, Sri K. Raji Reddy, learned senior Standing counsel for the Income Tax Department, filed a counter affidavit on behalf of the 3<sup>rd</sup> respondent denying the material averments made in the affidavit filed in support of the writ petition and contended *inter alia* that the petitioner company has not voluntarily offered an amount of Rs.1.50 crores under PMGKY scheme and Rs.3.50 crores of additional income for the assessment years 2016-17 and 2017-18 together, but, for the survey under Section 133A of the Act, 1961 by the investigation wing. The assessee company would not have admitted the additional income under PMGKY as well as under normal provisions. It is only after confronting with the incriminating material found by the income tax officer of the investigation wing, the petitioner company had admitted Rs.1.50 crores under PMGKY and Rs.3.50 crores under the normal provisions. Therefore, the petitioner company has admitted additional income of Rs.5 crores only because of the survey or otherwise it would have admitted an income of Rs.13.31 lakhs for the assessment year 2016-17 and a

meager income for the assessment year 2017-18. As such, the presumption for the assessment year 2017-18 is because of the fact that the petitioner company has not paid advance tax for the assessment year 2017-18 at all. Before passing an order of attachment under Section 281 B of the Act, 1961, the prior approval from the Principal Commissioner of Income Tax-2, Visakhapatnam, under whose territorial jurisdiction the petitioner company situated, was obtained apart from other aspects. To make good of his submissions, the learned senior Standing counsel placed reliance on the judgment of the Supreme Court in Civil Appeal Nos.7731 to 7737 of 2002<sup>2</sup>. Basing on the said judgment, he would submit that since the proceedings initiated under Section 143(2) of the Act, 1961, are pending consideration, the clarifications sought by the respondents can be given before the concerned authority seeking reasons for issuing the notices. Therefore, he would submit that the writ petition as filed is not maintainable.

In reply to the counter affidavit, the petitioner company had filed a reply affidavit.

Be that as it may, the scope of the writ petition in the light of the contentions raised by the petitioner company is in a very narrow compass i.e., whether the impugned

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<sup>2</sup> (2003) 259 ITR 0019

proceedings issued by the 3<sup>rd</sup> respondent is legal and valid in the eye of law.

To appreciate the said aspect, it is required to extract Section 281 B of the Act, 1961, and the same reads as under:

**“281B.** (1) Where, during the pendency of any proceeding for 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 Second Schedule.

(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 sub-section (1):

Provided that 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. .... and etc.”

A perusal of the said provision would indicate that the basic ingredient for invoking the provision is that during the pendency of any proceeding for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment, if the Assessing Officer is of the opinion that for the purpose of protecting the interest of the revenue, he may, with the previous approval of the Commissioner, by order in writing, attach provisionally any property belonging to the assessee. Every such attachment order shall have effect only for a period of six months from the

date of the order and the same can be extended by such further period or periods as he thinks fit provided reasons are recorded, but such extension shall not in any case exceed two years. Thus, a perusal of the above said provision would indicate that the Assessing Officer is not obligated to give any reasons for passing the order, but before passing the attachment order, he should have material before him for invoking the provisions of Section 281 B of the Act, 1961.

To appreciate the fact that whether any material was available before the 3<sup>rd</sup> respondent for forming an opinion to invoke the provisions of Section 281 B of the Act, 1961, the material enclosed to the counter affidavit clearly indicate that sufficient material was there before the 3<sup>rd</sup> respondent to pass the impugned proceedings. In fact, the observations of the Principal Commissioner of Income Tax-2, Visakhapatnam, for passing the provisional attachment under Section 281 B of the Act, 1961, proposed by the Income Tax Officer, Ward-4(1), and endorsed by the Additional Commissioner for Income Tax, Range -4, are as under:

“(a) The assessee-company has deposited huge cash of Rs.1.51 crores in its bank account during demonetization period and could not explain the source to the Investigation Wing and hence admitted the same under PMGKY. But, even the full amount admitted before the Investigation Wing was not honoured and filed PMGKY application for Rs.0.80 crores and retracted partly. So, the assessee’s promise of paying taxes when it becomes finally due, cannot be believed.

(b) Subsequent to survey operations by Investigation Wing only, the assessee-company has admitted an additional income of Rs.3.50 crores otherwise it was admitting an income of few lakhs of rupees, which clearly shows the intent of assessee’s nature of tax evasion.

(c) For the AY.2015-16, the Assessing Officer observed an amount of Rs.2.16 crores, which represents the difference between sale document price and actual amount shown in the books of account.

(d) For the AY.2018-19, even though there are huge sales of land, the assessee-company has not paid any advance tax in terms of Section 210 of I.T. Act.

(e) During the assessment proceedings, the Assessing Officer found that there was huge difference of Rs.12.00 crores between the unregistered sale agreements and sale deeds which were registered with Sub-Registrar of Immovable Properties. Thus, the assessee-company has evaded huge stamp duty to be paid to SRO, Govt. of Andhra Pradesh.

(f) In view of the assessee's behaviour mentioned above, the assessee-company may not pay the tax demand which may be raised to the extent of Rs.20 crores while completing the scrutiny assessments of A.Y.2015-16, 2016-17 & 2017-18 and penalty proceedings u/s.271(1)(c) for these years."

Thus, it is clear that there is enough material before the 3<sup>rd</sup> respondent to pass the provisional attachment order in the form of impugned proceedings. From a perusal of the material it cannot be said that there is any irregularity or illegality committed by the 3<sup>rd</sup> respondent while passing the impugned proceedings.

In **Barium Chemicals Limited and another v. Company Law Board and others**<sup>3</sup>, the Apex Court while dealing with Section 237 (b) of the Companies Act, 1956, was pleased to consider the aspect of formation of opinion, which is the subjective process and before the discretion conferred to order an investigation can be exercised there must exist circumstances which in the opinion of the authority that what

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<sup>3</sup> AIR 1967 SC 295

has been set out in sub-clauses 1, 2 and 3. The relevant portion is extracted as under:

“These grounds limit the jurisdiction of the Central Government. No jurisdiction, outside the section which empowers the initiation of investigation, can be exercised. An action, not based on circumstances suggesting an inference of the enumerated kind will not be valid. In other words, the enumeration of the inferences which may be drawn from the circumstances, postulates the absence of a general discretion to go on a fishing expedition to find evidence. No doubt the formation of opinion is subjective but the existence of circumstances relevant to the inference as the sine qua non for action must be demonstrable. If the action is questioned on the ground that no circumstances leading to an inference of the kind contemplated by the section exists, the action might be exposed to interference unless the existence of the circumstances is made out. As my brother Shelat has put it trenchantly:

“It is not reasonable to say that the clause permitted the Government to say that it has formed the opinion on circumstances which it thinks exist.”

Since the existence of “circumstances” is a condition fundamental to the making of an opinion, the existence of the circumstances, if questioned, has to be proved at least prima facie. It is not sufficient to assert that the circumstances exist and give no clue to what they are because the circumstances must be such as to lead to conclusions of certain definiteness. The conclusions must relate to an intent to defraud, a fraudulent or unlawful purpose, fraud or misconduct or the withholding of information of a particular kind. We have to see whether the Chairman in his affidavit has shown the existence of circumstances leading to such tentative conclusions. If he has, his action cannot be questioned because the inference is to be drawn subjectively and even if this Court would not have drawn a similar inference that fact would be irrelevant. But if the circumstances pointed out are such that no inference of the kind stated in S.237 (b) can at all be drawn the action would be ultra vires the Act and void.”

In the case on hand, the Income Tax Officer, Ward No.4(1), Range-4, Visakhapatnam, addressed a letter dated 22.12.2017 to the Principal Commissioner of Income Tax-2, Visakhapatnam, stating that the assessee-company is engaged in real asset business in developing and sale of plots. In this case, a survey under Section 133A was conducted by

the Investigation Wing, Unit-III, Visakhapatnam, on 22.03.2017 and consequently cash deposit of Rs.1,51,29,000/- was made by the company during demonetization period. As a result of survey, the assessee-company admitted Rs.1.50 crores as its unaccounted income and agreed to pay taxes availing the PMGKY Scheme, 2016, and Rs.3.50 crores under normal provisions, but the assessee-company filed an application under PMGKY scheme for Rs.0.80 crores only and paid taxes thereon under the scheme. The assessee-company filed revised return for the assessment year 2016-17 and filed regular return for the assessment year 2017-18. The said assessments are pending. It is also mentioned in the above said proceedings that as noticed from the sworn statement recorded by the Income Tax Officer of Investigation Wing from the Directors of the assessee-company on the day of survey, it was confirmed by them that the total sales declared for assessment year 2016-17 was Rs.4.93 crores showing the value per square yard at Rs.3,500/-. Owing to all the documents impounded, the Directors of the assessee-company have admitted that they have received Rs.6,500/- per square yard, whereas the sale documents were registered for the buyers only @ Rs.3,500/- per square yard and the difference amount of Rs.3,000/- per square yard is received by cash for 65000 square yards sold. Thus, the assessee-company sold 65000 square yards of sites for Rs.42,25,00,000/- and received

Rs.19,50,00,000/- as cash. As against which, the assessee-company accepted only 8% of Rs.42.25 crores as the net profit of the company clear of all expenses which comes to Rs.3,50,00,000/-. Thus, there is a net declaration of income to the tune of Rs.16,00,00,000/- to be spread over to assessment years 2016-17 and 2017-18. The tax effect on this issue works out to Rs.2.40 crores including minimum penalty under Section 271(1)(c) for concealment of income for the assessment year 2016-17 and Rs.9.10 crores including minimum penalty under Section 271(1)(c) for assessment year 2017-18, which aggregates to Rs.11.50 crores approximately. Therefore, a huge demand of more than Rs.20 crores is going to be raised in the pending assessments for the years 2015-16, 2016-17 and 2017-18. Hence, in order to protect the interest of revenue, the Income Tax Officer considered it necessary to provisionally attach the unsold plots and the land which remained undeveloped out of the total extent of Ac.62.84 cents belonging to the assessee-company under Section 281B of the Act, 1961, and requested that approval may be accorded for provisional attachment of the unsold/undeveloped portion of the land. In turn, the Additional Commissioner of Income Tax, Range-4, Visakhapatnam, addressed letter dated 26.12.2017 to the Commissioner of Income Tax-2, Visakhapatnam, referring to the proceedings dated 22.12.2017 of the ITO, Ward-4(1), Visakhapatnam, recommending provisional attachment under

Section 281B of the Act, 1961, in order to protect the interest of the revenue.

Relying on the above said two proceedings, the Principal Commissioner of Income Tax-2, Visakhapatnam, granted approval for provisional attachment under Section 281B of the Act, 1961, in respect of the unsold plots and undeveloped land out of total extent of Ac.62.84 cents belonging to the assessee-company.

The 3<sup>rd</sup> respondent, in exercise of powers vested in him under Section 281B of the Act, 1961, thereupon passed the impugned proceedings dated 28.12.2017 provisionally attaching the property mentioned therein. Thus, before passing of the impugned proceedings, there was sufficient material before the 3<sup>rd</sup> respondent, to form an opinion for invoking the provisions of Section 281B of the Act, 1961, and to pass provisional attachment orders.

On the above analysis, this Court finds no merit in the writ petition. The writ petition is accordingly dismissed. Miscellaneous petitions, if any, shall also stand dismissed.

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**JUSTICE SANJAY KUMAR**

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**JUSTICE P. KESHAVA RAO**

Date: 06.04.2018.  
ES/CCM