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IN THE HIGH COURT OF DELHI AT NEW DELHI

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Reserved on: 23rd October, 2009
Pronounced on : 23rd December, 2009

1) WP(C) No. 8436 of 2009 & CM No.5350/2009

Nimitya Properties Ltd. . . . Petitioner

through : Mr. Salil Kapoor with Mr.
Sanat Kapoor and Ms. Swati
Kapoor, Advocates.

VERSUS

Commissioner of Income Tax & Others . . . Respondent

through: Mr. Sanjeev Sabharwal with
Mr. Subhash Bansal, Advocates.

2) WP(C) No. 8435 of 2009 & CM No.5349 of 2009

Nimitya Promoters Ltd. . . . Petitioner

through : Mr. Salil Kapoor with Mr.
Sanat Kapoor and Ms. Swati
Kapoor, Advocates.

VERSUS

Commissioner of Income Tax & Others . . . Respondent

through: Mr. Sanjeev Sabharwal with
Mr. Subhash Bansal, Advocates.

3) WP(C) No. 12172 of 2009 & CM No.12385 of 2009

Nimitya Promoters (P) Ltd. . . . Petitioner

through : Mr. Salil Kapoor with Mr.
Sanat Kapoor and Ms. Swati
Kapoor, Advocates.

VERSUS

Commissioner of Income Tax & Others . . . Respondent

through: Mr. Sanjeev Sabharwal with
Mr. Subhash Bansal, Advocates.

4) **WP(C) No. 12173 of 2009 & CM No.12386 of 2009**

Nimitya Properties Ltd. . . . Petitioner

through : Mr. Salil Kapoor with Mr.
Sanat Kapoor and Ms. Swati
Kapoor, Advocates.

VERSUS

Commissioner of Income Tax & Others . . . Respondent

through: Mr. Sanjeev Sabharwal with
Mr. Subhash Bansal, Advocates.

CORAM :-

THE HON'BLE MR. JUSTICE A.K. SIKRI

THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

1. The two petitioners herein, *viz.*, Nimitya Properties Ltd. and Nimitya Promoters Ltd., who belong to the same group, have filed two petitions each. In the first two petitions filed by these petitioners, the challenge is laid to the orders dated 06.02.2009 passed under Section 281B of the Income Tax Act (hereinafter referred to as 'the Act'), provisionally attaching their properties. Other two petitions by each of them came to be filed because of the orders dated 03.08.2009 passed under Section 281B of the

Act extending the time of attachment of the properties upto 31.07.2010. Thus, these subsequent orders are passed as a continuation/extension of the first order. The circumstances under which the attachment orders in respect of properties belonging to these two petitioners have been passed are identical. For these reasons, writ petitions were heard together and by this common judgment, issues raised in all these writ petitions are dealt with. For the sake of brevity, we shall take note of the facts of Writ Petition (C) No.8436/2009.

2. A search & seizure operation was conducted by the Income Tax authorities at the office premises of Nimitya Properties Ltd. on 06.11.2008. Some documents were seized and the premises were sealed. Twenty days thereafter, *i.e.*, on 26.11.2008, office premises of the petitioners were de-sealed. The documents were put in one almirah and restrained order was passed under Section 132(3) of the Act. On 30.12.2008, the almirah was opened by the Deputy Director of Investigation (respondent No. 3) and documents were seized. It was followed by order dated 06.02.2009 issued under Section 281B of the Act by the Income Tax Officers attaching the property No. 3, Avenue Cassia, Westend Greens, Rajokri, New Delhi. This order reads as under:

“Sub: ORDER UNDER SECTION 281 B OF THE INCOME TAX ACT, 1961

In exercise of the power conferred upon me u/s 281 B of the Income Tax Act, 1961 the Farm Hose No.3, Jacranda, Westend Green, Rajokari, New Delhi-110038, held by M/S Nimitaya Properties Ltd are hereby attached with the immediate effect. You are hereby required not to pat with or transfer or alienate deal with above mentioned property till further order.”

3. In the case of other petitioner, *viz.*, Nimitya Promoters (P) Ltd., on the same date, search and seizures were conducted at their premises, documents were seized, restrain orders were passed under Section 132(3) of the Act and ultimately, orders were passed under Section 281B on 26.02.2009 provisionally attaching the property No. 1, Golden Gates, West End Green, Rajokri, New Delhi.
4. According to the petitioners, the properties attached form part of stock-in-trade and no tax was outstanding against the petitioners. Thus, letter dated 10.02.2009 was written bringing these aspects to the notice of the respondents and the respondents were also asked to provide reasons for attachment of the properties. This was followed by application/letter dated 04.03.2009 requesting the respondent No. 2 to withdraw the said orders dated 06.02.2009, but no response was received. Therefore, reminder dated 16.03.2009 was also sent. In reply

thereto, the respondent No. 2 informed the petitioners vide its letter dated 17.03.2009 that attachment orders have been passed on the basis of proposal received from the respondent No. 3 vide letter dated 30.12.2008 informing that a large number of incriminating documents were seized and huge demand is likely to be raised under Sections 153A and 153C and there was an apprehension that the petitioners may transfer the properties just to defer the payment of taxes. Therefore, the respondent No. 3 had requested that to safeguard the interest of Revenue, the said property be attached under Section 281B of the Act pending assessment for the Assessment Year 2007-08.

5. The case of the petitioners is that such an order could not have been passed inasmuch as assessment after Assessment Year 2005-06 and 2006-07 had been completed under Section 143(3) of the Act and no additions had been made except for minor disallowances. No tax payment was outstanding. Likewise, no proceedings for assessment or re-assessment were pending at the time of passing of the orders. Insofar as the assessment year 2007-08 is concerned, notice under Section 143(2) was issued on 16.09.2008 and no assessment proceedings had been taken up thereafter and no enquiry had been made so far. In any case, that assessment stood abated on the date of initiation of search as per second proviso to Section 153A(1) of the Act and thus

assessment in respect of assessment year 2007-08 was also not pending.

6. The petitioners also make a grievance that documents seized on 06.11.2008 had not been confronted and no question had been asked from them and no notice under Section 153A or 153C had been issued. The petitioners have also referred to the instructions of Central Board of Direct Taxes issued as Addendum dated 05.11.2004 in which it is recommended that the provisions of Section 281B should be resorted to only in cases where there is a reasonable likelihood of the recovery becoming difficult due to inadequacy of assets and where there are sufficient assets to cover the demand, the provisions of Section 281B should not be resorted to, except under exceptional circumstances warranting the same.
7. On the basis of the aforesaid pleas taken in the petition, Mr. Salil Kapoor, learned counsel appearing for the petitioners, argued that there was no basis for attachment of the properties, even provisionally, in the absence of any tax demand or pendency of any assessment proceeding. He also submitted that as on the date of search, even no surrender was made by the petitioners. His further submission was that the Competent Authority who can pass such an order is the Assessing Officer and he was supposed to apply his own mind and could not have passed the

order at the instance of other Authority, *viz.*, the respondent No. 3 in this case.

8. Insofar as orders dated 03.08.2009 extending this attachment is concerned, his submission was that this order was passed by the AO who was not the Competent Authority, as such an extension order could be passed only by the Commissioner. Furthermore, even while passing the extension order, the Assessee was not confronted with seized documents. He also referred to and relied upon the judgment of Punjab & Haryana High Court in the case of **Sukhpal Singh (HUF) Vs. Commissioner of Income-tax and Anr.** [156 ITR 480] wherein the Court held that notices issued for provisional attachments of fixed deposit under Section 281B were effective only for a period of six months and this period could be extended by the CIT only in exercise of his powers under sub-section (2) of Section 281B of the Act and for want of material on the record to show that the ITO had formed an opinion on the basis of some material that it was necessary to attach the property in order to protect the interest of the Revenue, notices in provisionally attachment were unsustainable.

The Court held as under:

“4. After hearing the learned counsel for the parties, in the circumstances of the case, we find force in the contention of the learned counsel for the petitioner. A bare perusal of the impugned notices would show that the Income-tax Officer has passed the order of the provisional attachment of the F.D.Rs. till further orders.

According to the aforesaid provision, this provisional attachment remains operative only for a period of six months, but this period could be extended by the Commissioner in exercise of his powers under Sub-section (2) of Section 281B of the Act, after recording reasons for the extension of such period. In the instant case, the period of six months has since expired. Mr. Ashok Bhan, Senior Advocate, learned counsel for the Department, has not been able to produce today before us any order of the Commissioner by which the extension of the provisional attachment may have been granted. As the period of six months has expired, the provisional attachment ceases to be of any effect.”

9. Mr. Sanjeev Sabharwal and Mr. Subhash Bansal, who appeared for the Revenue refuted the aforesaid submissions. We shall take note of their arguments while dealing with contentions of the learned counsel for the petitioner.
10. It would be apt to initiate the discussion by taking note of the provisions of Section 281B. The relevant portion of this provision reads as under:

“PROVISIONAL ATTACHMENT TO PROTECT REVENUE IN CERTAIN CASES.

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 Chief Commissioner, Commissioner, Director-General or Director, by order in writing, attach provisionally any property belonging to the assessee in the manner provided in the Second Schedule.

Explanation : For the purposes of this sub-section, proceedings under sub-section (5) of section 132 shall be deemed to be proceedings for the assessment of any income or for the assessment or reassessment of any income which has escaped assessment.

(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 Chief Commissioner, Commissioner, Director-General 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 :”

11. Sub-section (1) of Section 281B authorizes the Assessing Officer to pass provisional order of attachment of property belonging to the assessee ‘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’. This has to be done with the previous approval of the Chief Commissioner, Commissioner, Director-General or Director. The explanation attached to sub-Section (1) gives the scope of ‘proceedings’ and categorically provides that proceedings under sub-Section (5) of section 132 shall be deemed to be proceedings for the assessment of any income, etc. Section 132 deals with search and seizure. In the present case, such search and seizure had taken place under the said provision and provisional assessment order is the consequence of that search and seizure. Therefore, the explanation wherein reference to provisions of Section 132 is made becomes applicable in the instant case. Sub-section (5) of Section 132 provides for making an order estimating the undisclosed income in a summary manner and calculating the

amount on tax of income where any money, bullion, jewellery or other valuable article or thing is seized under that provision. This sub-section has been omitted by the Finance Act, 2002, with effect from 01.06.2002 and therefore, was no more available on the date of search in the cases of these petitioners. However, what is relevant fact is in Explanation 2 to Section 132, which reads as under:

“Explanation 2. – In this section, the word “proceeding” means any proceeding in respect of any year, whether under the Indian Income-tax Act, 1922(11 of 1922), or this Act, which may be pending on the date on which a search is authorized under this section or which may have been completed on or before such date and includes also all proceedings under this Act which may be commenced after such date in respect of any year.”

12. The ambit and scope of word “proceeding” is expanded by this Explanation to include not only those proceedings, which are pending on the date of attachment of the property, when the search is authorized under Section 132, but also proceedings which may have been completed on or before such date and includes all proceedings under this Act, which may be commenced after such date in respect of any year. No doubt, proceedings in respect of Assessment Year 2007-08 stands abated because of the search. However, it is also a fact, which cannot be shyed away, that the proceedings for that assessment year will have to be initiated under Section 153A or 153C of the Act. Such proceedings, which are to be necessarily commenced

as a result of the search, are to be treated as proceedings under this Act. By virtue of Explanation to Section 281B of the Act, these are to be treated as the proceedings within the meaning of sub-Section (1) of Section 281B of the Act.

13. In view thereof, we do not agree with the contention of the learned counsel for the petitioner that no such order under Section 281B of the Act could be passed, as no assessment proceedings were pending on that date.
14. This takes us to the next contention put forth by the learned counsel for the petitioner, *viz.*, the AO passed the impugned orders at the dictates of other authority, *viz.*, the respondent No. 3 without considering the issue independently by applying his own mind. We have already reproduced the orders dated 06.02.2009 passed by the AO. This order is passed by him, as stated therein, in exercise of the power conferred upon him under Section 281B of the Act. The petitioner, however, relies upon the letter dated 17.03.2009 addressed by the AO to the petitioner in response to the petitioners' request to withdraw the aforesaid attachment. In this letter, I.T.O. has mentioned that the property was attached on the basis of proposal received from Deputy Director of Income Tax (Inv) Unit-IV-3, New Delhi vide his letter dated 05.01.2009. Vide this letter, Deputy Director had informed that the search and seizure operation was

conducted on 06.11.2008 wherein a large number of incriminating documents and evidence regarding bogus credit entries were gathered and huge demand is likely to be raised under Section 153A and 153C of the Income Tax Act. The Deputy Director had expressed the apprehension that just to defer the payments of tax; the assessee may transfer the properties and therefore, requested the AO to attach the mentioned immovable properties to safeguard the interest of the Revenue. No doubt, after the AO received this letter, he passed the impugned attachment orders. However, at the same time, one cannot overlook the fact that search operation was conducted by the Deputy Director, Income Tax and therefore, only he could bring the fact of the said search to the notice of the AO. Therefore, the AO was apprised of the said search and was also apprised of the fact that various incriminating documents and evidence regarding purported bogus entries were gathered, which could result in huge demand against the petitioners in that context, the suggestion was mooted by the Deputy Director for attachment of the property to protect the interest of the Revenue. However, the letter dated 17.03.2009 further mentions that "in view of the above facts and assessment pending for A.Y. 2007-08 the order of attachment was passed". Thus, when these facts were brought to the notice of the AO, it is he who alone exercised his discretion finding it to be a fit case

for attachment of the property in question. Therefore, it cannot be said that he was simply carried by the suggestion mooted by the Deputy Director and did not apply his own mind.

15. The fact situation in *Gujarat Gas Co. Ltd. Vs. Joint Commissioner of Income Tax (Assessment)* [245 ITR 84] was entirely different. In that case, what was found is that the Central Board of Direct Taxes had issued instructions to the sub-ordinate Authorities directing that assessments to be made in a particular manner. This included the instructions that in scrutiny cases under Section 143 (3) of the Act, the income cannot be assessed at a figure lower than the returned income. Circular issued by the CBDT in exercise of powers under Section 119 was found to be *ultra vires* on the ground that the AO exercised *quasi judicial* functions and other authorities cannot control or affect his judgment in the matter of assessment. Furthermore, the present order under Section 281B of the Act is administrative in nature and not *quasi judicial*.
16. This leaves us with the last contention of the petitioner, which relates to orders dated 03.08.2009 whereby the attachment period is extended. It was argued that the extension order could be passed only by the Commissioner, which is the Authority specifically mentioned in Section 181B(2) of the Act.

17. This argument is found to be factually incorrect and militates against the record. We find that the Assistant Commissioner of Income Tax (Central Circle-22) had addressed a letter dated 24.07.2009 to the Commissioner of Income Tax pointing out about the attachment orders dated 26.02.2009 passed by the AO with prior approval of the Commissioner of Income Tax. It was further mentioned in this communication that in many of the group cases, the orders under Section 127 of the Act were yet to be passed, the case records were yet to be received, further notices to be issued, inquiries, investigations to be made and thereafter only assessment orders could be passed. The request was, therefore, made for extension to the provisional attachment. On this, the Commissioner gave his approval on 31.07.2009 in the following manner:

“I have gone through the proposal of the AO. In view of the facts mentioned in the proposal, I am satisfied that this is a fit case to extend the provisional attachment upto 31.07.2010. The A.O. shall make efforts to complete the assessments as early as possible.”

18. After the aforesaid approval was given on the file, letter dated 31.07.2009 was written by the Deputy Commissioner of Income Tax to the Assistant Commissioner of the Income Tax informing him about the approval. This led to passing of the orders dated 03.08.2009 and in this order also it is specifically

mentioned that the same is issued after taking approval from the CIT (Central)-III, New Delhi.

19. In view of this factual position prevailing on the record, judgment of the Punjab and Haryana High Court in ***Sukhpal Singh (HUF)*** (supra) would not come to the aid of the petitioner.
20. The upshot of the aforesaid discussion that the provisional order of attachment originally passed on 06.02.2009 and extension of this order vide orders dated 03.08.2009 are without blemish, valid and legal. Finding no force in the writ petitions, we dismiss the same.
21. Before we part with, it is necessary to point out that such attachment orders naturally are prejudicial to the petitioners. No doubt, the Revenue has justified the passing the attachment orders to safeguard its interest. At the same time, provisional attachment orders should not continue for indefinite period. Therefore, the respondents are impressed upon to complete all the assessment proceedings before 31.07.2010 so that the petitioners know their fate and necessity of extension the provisional attachment is obviated.
22. In the facts of these cases, there shall be no orders as to costs.

**(A.K. SIKRI)
JUDGE**

**(SIDDHARTH MRIDUL)
JUDGE**

December 23, 2009.

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THE HON'BLE MR. JUSTICE SIDDHARTH MRIDUL

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

A.K. SIKRI, J.

For orders, see WP (C) No. 8436/2009.

**(A.K. SIKRI)
JUDGE**

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