IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO. 2983 OF 1987

1. Indian Express Newspapers (Bombay) Private Ltd., A Pvt. Ltd. Company incorporated under the provisions of the Companies Act, 1956 and having its Registered office at Express Towers, Nariman Point, Bombay – 400 021

2. Navinchandra Revashanker Mehta Indian Inhabitant, R/at 2/C 1 Geetanjali Nagar, Off. S.V. Road, Borivali (West) Bombay 400 092 and a shareholder of Indian Express Newspapers (Bombay) Pvt. Ltd. .. Petitioners

v/s.

1. Inspecting Assistant Commissioner, of Income-Tax, Assessment Range – I(B), having his office at Room No.603 Aaykar Bhavan, Maharshi Karve Road, Bombay – 400 020.

2. District Valuation Officer-I, Income-Tax Department, 2nd Floor, Piramal Chambers, Parel, Bombay – 400 012.

3. Union of India .. Respondents

Dr. Abhinav Chandrachud a/w Mr. Amol Joshi, Mr. Sugiyan Shaikh i/b Poorvi Kamani for the petitioner
Mr. Anil C. Singh, ASG a/w Mr. Ashok Kotangle, Ms. Geetikia Gandhi, Mr. Arun D. Nagarjun i/b Mr. A.K. Saxena for respondent nos. 1 to 3.

CORAM : M.S. SANKLECHA &
SANDEEP K. SHINDE, J.J.

DATE ON WHICH JUDGMENT IS RESERVED **: 23rd MARCH, 2018.**
DATE ON WHICH JUDGMENT IS PRONOUNCED **: 2nd APRIL, 2018.**

JUDGMENT : (Per M.S. Sanklecha, J)

1. This petition under Article 226 of the Constitution of India seeks the following reliefs :-

(a) A declaration that Section 40(3) of the Finance act, 1983 (the Act) is ultra vires to the Constitution of India and, therefore, void;

(b) A declaration that the three immovable properties (at Bombay, Hyderabad and Talegaon) owned by the petitioner do not attract the provisions of Section 40(3) of the Act;

(c) Writ of prohibition restraining the respondents from giving effect to the notices issued for assessment dated 22nd May, 1987, notices for penalty dated 4th August, 1987 and notices for launching of prosecution dated 31st July, 1987 all under the Wealth Tax Act, 1957 (Wealth Tax Act); and

(d) Writ of certiorari to quash the notices for assessment dated 22nd May, 1987, notices for penalty dated 4th August, 1987 and notices for prosecution dated 31st July, 1987 issued by the respondents.

2. On 19th September, 1987, this petition was admitted. On 25th

September, 1987, this Court had granted following interim reliefs.

> *"The petitioners are directed to file their return on or before 31st December, 1987. The proceedings for assessment may go on and terminate in assessment order during the pendency of this petition. However, no notice of demand shall be issued without further orders. It is clarified that the valuation may also be completed. Prosecution proceedings are also stayed."*

Factual Matrix :-

3. The petitioner is engaged in printing and publishing the newspapers including Indian Express, Finance Express, Loksatta etc. In the course of its business, the petitioner out of profits earned in its business of publication of newspapers acquired following three properties.

(a) Multi-storied building known as "Express Tower" at Nariman Point, Mumbai.

(b) Land and building at 1-2-528 to 591, Tank Bund Road, Domulguda, Hyderabad, leased to Andhra Prabha Pvt. Ltd. and used for its newspaper business; and

(c) Vacant land at Talegaon.

4. In 1983, the Finance Minister while introducing the Finance Bill

in the Parliament, in its budget speech *inter alia* stated as under :-

> "101. *It has come to my notice that some persons have been trying to avoid personal wealth-tax liability by forming closely-held companies to which they transfer many items of their wealth, particularly jewellery bullion and real estate. As companies are not chargeable to wealth-tax, and the value of the share of such companies does not also reflect the real worth of the assets of the company, those who hold such unproductive assets in closely held companies are able to successfully reduce their wealth-tax liability to a substantial extent. With a view to circumventing tax avoidance by such persons, I propose to revive the levy of wealth-tax in a limited way in the case of closely held companies. Accordingly, I am proposing the levy of the wealth-tax in the case of closely-held companies at the rate of 2 per cent on the net wealth represented by the value of specified assets, such as jewellery, gold, bullion, buildings and lands owned by such companies. Buildings used by the company as factory, godown, warehouse, hotel or office for the purposes of its business or as residential accommodation for its low-paid employees will be excluded from the net wealth."*

5. The Finance Bill, 1983 was thereafter enacted into the Act and Section 40 therein reads as under :-

> *"40. (1) Notwithstanding anything contained in section 13 of the Finance Act, 1960, relating to exemption of companies from levy of wealth-tax under the Wealth-tax Act, 1957 (hereinafter referred to as the Wealth-tax Act), wealth-tax shall be charged under the Wealth-tax Act for every assessment year commencing on and from the 1st day of April, 1984 in respect of the net wealth on the corresponding valuation date of every company, not being a company in which the public are substantially interested, at the rate of two per cent of such net wealth.*
>
> *Explanation – For the purposes of this sub-section, "company in which the public are substantially interested" shall have the meaning assigned to it in clause (18) of section 2 of the Income-tax Act.*

(2) For the purposes of sub-section (1), the net wealth of a company shall be the amount by which the aggregate value of all the assets referred to in sub-section (3), wherever located, belonging to the company on the valuation date is in excess of the aggregate value of all the debts owed by the company on the valuation date, which are secured on, or which have been incurred in relation to, the said assets:

Provided that where any debt secured on any asset belonging to the assessee is incurred for, or ensures to, the benefit of any other person, or is not represented by any asset belonging to the assessee, the value of such debt shall not be taken into account in computing the net wealth of the assessee.

(3) The assets referred to in sub-section (2) shall be the following namely : –

(i) gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals;

(ii) precious or semi-precious stones whether or not set in any furniture, utensil or other article or worked or sewn into any wearing apparel;

(iii) ornaments made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals, whether or not containing any precious or semi-precious stone, and whether or not worked or sewn into any wearing apparel;

(iv) utensils made of gold, silver, platinum or any other precious metal or any alloy containing one or more of such precious metals;

(v) land other than agricultural land;

(vi) building or land appurtenant thereto, other than building or part thereof used by the assessee as factory, godown, warehouse, hotel or office for the purposes of its business or as residential accommodation for its employees or as a hospital, creche, school, canteen, library, recreational centre, shelter, rest-room or lunch room mainly for the welfare of its employees and the land appurtenant to such building or part:

Provided that each such employee is an employee

whose income (exclusive of the value of all benefits or amenities not provided for by way of monetary payment) chargeable under the head "Salaries" under the Income-tax Act does not exceed eighteen thousand rupees;

(vii) motor-cars; and

(viii) any other asset which is acquired or represented by a debt secured on any one or more of the assets referred to in clause (I) to clause (vii).

(4) The value of any asset specified in sub-section (3) shall, subject to the provisions of sub-section (3) of section 7 of the Wealth-tax Act, be estimated to be the price which, in the opinion of the Wealth-tax Officer, it would fetch if sold in the open market on the valuation date.

(5) For the purposes of the levy of wealth-tax under the Wealth-tax Act, in pursuance of the provisions of this section –

(a) Section 5, clause (a) of sub-section (2) of section 7 and clause (d) of section 45 of that Act and Part II of Schedule I to that Act shall not apply and shall have no effect,

(b) the remaining provisions of that Act shall be construed so as to be in conformity with the provisions of this section.

(6) Nothing in this section shall apply to any institution, association or body, whether incorporated or not and whether Indian or non Indian, which the Central Government may, having regard to the nature and object of such institution, association or body, specify by notification in the Official Gazette and every notification issued under this sub-section shall be laid, as soon as may be after it is issued, before each House of Parliament.

(7) Subject to the provisions of sub-section (5), this section shall be construed as one with the Wealth-tax Act."

6. Consequent to the enactment of Section 40 of the Act, the petitioners received notices dated 22nd May, 1987 under Section 16(4)

of the Wealth Tax Act, directing the petitioners to file its returns of wealth for Assessment Years 1984-85, 1985-86 and 1986-87. Thereafter, notices of penalty were issued on 4th August, 1987 under Section 18(2) of the Wealth Tax Act and notices for prosecution dated 31st July, 1987 were also issued under Section 35B of the Wealth Tax Act. The receipt of the above notices resulted in the petitioners filing this petition on 4th September, 1987.

7. The petitioners have filed the petition challenging the constitutional validity of Section 40(3) of the Act. The primary challenge was to the legislative competence of the Parliament to enact Section 40(3) of the Act to the extent it seeks to bring to tax land and buildings. This on the ground that legislation on land and buildings would stand covered by the list-II of 7th Schedule to the Constitution i.e. the State list. Therefore, beyond the legislative competence of the Parliament. The subsidiary challenge was to Section 40(3) of the Act on the ground that it is not based / founded on any intelligible differentia or in any event the classification made in Section 40(3) of the Act has no rationale connection and / or nexus with the object of the Act.

8. At the hearing, Dr. Chandrachud, learned Counsel appearing for the petitioners stated, on instructions, that the petitioner is not pressing its challenge to the legislative competence of the parliament to enact Section 40(3) of the Act. Therefore, it is restricting its challenge in the petition to Section 40 of the Act and in particular on the ground that Section 40(3) of the Act is arbitrary and violates Article 14 of the Constitution of India.

9. In support of the petition, it was submitted as under :-

(a) Section 40 of the Act is arbitrary and violative of Article 14 of the Constitution of India. This for the reason that the classification of all companies in which the public are not substantially interested as defined in Section 2(18) of the Income Tax Act has no rationale nexus to the object of the Act viz. to bring to tax all closely held companies to which properties listed out in Section 40(3) of the Act have been transferred by its shareholders. This object of section 40 of the Act is manifest on reading the Finance Minister's speech introducing the bill leading to the enactment of Section 40 of the Act.

(b) Section 40(1) and (2) of the Act it is submitted seeks to classify all companies in which public are not substantially interested to be

included within the scope of Section 40 of the Act. Nevertheless, it excludes closely held public limited companies on being listed on the stock exchange, from being classified as companies in which public are not substantially interested. Thus, the above class of companies are outside the scope of Section 40 of the Act. According to the petitioners, this discrimination between the companies is bad-in-law as it suffers from what the petitioners call overbreath i.e. to overdo classification so as to undo equality.

10. At this, we inquired of Dr. Chandrachud that the challenge in the petition is only to Section 40(3) of the Act i.e. inclusion of land and buildings as a part of the assets of the closely held company. The submissions made across the bar is far beyond the challenge in the petition. In the circumstances, the petitioners were asked to justify the widening of the challenge at the hearing of the petition in the absence of it being in the petition.

11. Dr. Chandrachud, responded to the Court query by making following submissions :-

(a) Attention was invited to Section 40(3) of the Act and it was pointed out that Section 40(3) of the Act makes a reference to Section

40(2) which in turn refers to Section 40(1) of the Act. Thus, the challenge to Section 40(3) of the Act would entitle the petitioners to challenge the entire Section 40 of the Act;

(b) A challenge to constitutional validity could not be ignored merely on account of improper drafting. The court in such a case, should allow the petitioners to amend the petition or alternatively, allow the petitioners to make submissions in support of their challenge that the entire Section 40 of the Act is unconstitutional. In support, reliance was placed upon the Supreme Court decision in ***Prabodh Verma and Ors. Vs. State of Uttar Pradesh and Ors. (1984) 4 SCC 251***; and

(c) It was further submitted that the kernal of the petitioners' challenge to Section 40 of the Act is found in the pleadings and in particular our attention was drawn to ground (b) in paragraph 26 of the petition. Therefore, it is submitted that the challenge to entire Section 40 of the Act should not be disallowed merely because the prayer clause does not seek the relief.

12. On hearing the aforesaid submissions, we called upon the learned Additional Solicitor General to respond to the submissions made on behalf of the petitioners to our objection. It was pointed out by the respondent that a challenge to the constitutional provision is a

serious issue and the onus is that much higher on the petitioners as there is always a presumption about the constitutionality of the provision enacted by the legislature. Therefore, it is not permissible to infer on the basis of the reference to some other sub-section in the provision which has been challenged to contend that the other sub-section is also a subject matter of challenge. It was also further pointed out that challenge to Section 40(1) and (2) of the Act as contended by the petitioners is not correct as the ground taken in paragraph 26(b) in the petition is with reference to Section 40(3) of the Act alone and cannot be stretched to include challenge to Section 40(1) and (2) of the Act. Besides, it was submitted that the decision of the Apex Court in *Prabodh Verma* (supra) would have no application to the facts of the present case as in that case, the prayer clause was vague and not restricted to any specific provision as in this case. It was also submitted that the petition was filed in 1987. No attempt to amend the petition was made for all these years. This for the reason that it was always the petitioners' case that what has been challenged here is only Section 40(3) of the Act and ingenuity of its advocate cannot improve upon what the petitioners had sought to challenge in this petition. This is more particularly so in the absence of any attempt to amend the petition for the last about 30 years. Therefore, it is not a

case of mere technicality or improper drafting but a conscious decision by the petitioners to only challenge Section 40(3) of the Act. Therefore, the decision in Prabodh Verma (supra) would not apply to the facts of the present case.

13. Thereafter, with the aid of the Counsel for both sides we went through the entire petition and found that the challenge in the entire body of the petition is to Section 40(3) of the Act. In fact, primary challenge in the petition as filed was to the legislative competence of the Parliament to make legislation in respect of the land and buildings which according to the petitioners would properly fall in the State list. This of course, is not now being pressed. Therefore, it is not the case of mere improper drafting but a conscious decision to only challenge Section 40(3) of the Act and the body of the petition supports the prayer as made in the petition. The decision of the Apex Court in Pramod Verma (supra) would have no application to the facts in the present petition. For the reason that in that case the prayer clause was for writ of certiorari to quash the U.P. Ordinance 22/1978. The Apex Court observed that the writ of certiorari which is essentially for calling of records and proceedings pending before an Authority, can never be issued in respect of a challenge to declare a legislative provision as

unconstitutional and void. Thus, the writ of certiorari as sought for is wholly inappropriate when seeking a declaration that a legislative measure is unconstitutional. The Apex Court in the above case has observed that the petition should be properly drafted particularly bearing in mind that there were advocates engaged to draft the petition and it was not a petition from a prisoner languishing in jail or from a bonded labourer or by a public spirited citizen seeking to bring a gross injustice to the notice of the Court. It was in the aforesaid facts that the Court held that mere improper drafting of a prayer should not result in the petition itself being dismissed and normally the Court should insist on an amendment to ensure that the petitions are properly drafted. In this case, the petition has been filed by people involved in the world of business and appropriate legal assistance was also obtained. Therefore, the challenge by the petitioners to only Section 40(3) of the Act was an informed decision taken by the petitioners with the aid of their advisors to file the petition. For over thirty years this petition has been pending and no attempt was ever made to amend the petition.

14. The Apex Court has time and again reiterated the fact that the person who challenges the validity of any statute on the ground that the same contravenes Article 14 of the Constitution, must make

specific, clear and unambiguous allegation so as to show that the impugned statute is based on discrimination or that classification made has no rationale nexus with the object sought to be achieved by the Act. The Apex Court in ***Amrit Banaspati Co. Ltd. Vs. Union of India & Ors. (1995) 3 SCC 335*** after referring to the earlier decision in *V.S. Rice and Oil Mills Vs. State of A.P. AIR 1964 SC 1781, G.K. Krishnan Vs. State of T.N. (1995) 1 SCC 375* and *R.K. Garg Vs. Union of India (1981) 4 SCC 675* has observed that :-

> *"It is settled law that the allegations regarding the violation of constitutional provision should be specific, clear and unambiguous and should give relevant particulars, and the burden is on the person who impeaches the law as violative of constitutional guarantee to show that the particular provision is infirm for all or any of the reasons stated by him."*

15. In fact, the larger bench of the Supreme Court in ***The Anant Mills Co. Ltd. Vs. State of Gujarat and Ors. (1975) 2 SCC 175*** in respect of the pleadings to challenge the constitutional validity of an Act has *inter alia* observed that :-

> *"There is a presumption of the constitutional validity of a statutory provision. In case any party assails the validity of any provision on the ground that it is violative of Article 14 of the Constitution, it is for that party to make the necessary averments and adduce material to show discrimination violative of Article 14. .....*

It is, in our opinion, extremely hazardous to decide the question of the constitutional validity of a provision on the basis of supposed existence of certain facts by raising a presumption. …….

A pronouncement about the constitutional validity of a statutory provision affects not only the parties before the Court, but all other parties who may be affected by the impugned provision. There wound, therefore, be inherent risk in striking down an impugned provision without having the complete factual data and full material before the Court. ….”

16. On the aforesaid position in law, we examined the ground in paragraph 26(B) of the petition. This paragraph according to the petitioners contains the seed of the challenge to the entire Section 40 of the Act. To better appreciate the submission on behalf of the petitioners, we reproduce that the portion of the ground being relied upon by the petitioners as containing the kernal of its submission to challenge Section 40 of the Act in its entirety, which reads as under :-

“(B) It is further submitted that the said Section 40(3) of the Finance Act, 1983 is violative of the fundamental right to equality of the fundamental right to equality guaranteed by and under Article 14 of the Constitution of India for the following reasons:

It is submitted that the classification, on the basis of which section 40(3) has been enacted, is not founded on any intelligible differentia which separate and distinguish those

companies and assets which are included within the purview of the said Section 40(3), from those companies and assets which are excluded from the scope of the said section 40(3). It is further submitted that even in the event of this Hon'ble Court coming to the conclusion that there are differentia which distinguish those companies and assets which are included within the classification contained in section 40(3), as compared to those persons and assets which are excluded from the said classification, then, the said differentia have no rational connection or nexus with the object of the classification."

On a perusal of paragraph 26(B) of the petition, it is evident that the submissions were made in the context of challenge to Section 40(3) of the Act. The above averments do not meet the test laid down by the Apex Court, that a constitutional challenge must be specific, clear and unambiguous.

17. The above averments do not contain any allegation or material to support the submissions being made on behalf of the petitioners that by classifying of companies in which public are not substantially interested as closely held companies, leaves out closely held companies from the definition of companies, in which public are not substantially interested when they are closely held public limited companies which are listed.

The challenge in our view on the basis of the averments were only in the context of Section 40(3) of the Act and did not have any relation to Sections 40(1) and / or 40(2) of the Act. We do not accept the contention on behalf of the petitioners that a pure legal issue which give rise to discrimination, need not be alleged in the petition with particulars in respect of allegations. Even a legal challenge must have foundation on facts i.e. specifically state as to how it is being discriminated against. We are, therefore, of the view that the petitioners have to be restricted only to the challenge urged in the petition i.e. constitutional validity of Section 40(3) of the Act. The other contention being sought to be raised across the bar for the first time, cannot be entertained. The rule was issued in 1987 with specific reference to the challenge made to Section 40(3) of the Act alone.

18. In the above view, we called upon Dr. Chandrachud, the learned Counsel for the petitioners to address us on the only challenge in the petition i.e. in respect of Section 40(3) of the Act. This was for the reason that we would only examine the constitutional challenge urged in the petition.

19. It is submitted that Section 40(3) of the Act is unconstitutional as

it brings to tax all lands and buildings (to the extent not used for the purposes of the business) owned by a company in which public are not substantially interested, as it has no relation to the object of the Act. It is submitted that the object of the Act as evident from the speech of the Finance Minister while introducing the Bill was to bring to tax all lands and buildings which have been transferred by members of closely held companies to such companies. Therefore, the object was not to bring to tax the lands and buildings of the companies which have been organically acquired by the companies in which the public are not substantially interested i.e. out of its own profits while running the business. The object of Section 40(3) of the Act was to bring to tax lands and building transferred to it from its members. Thus, it is submitted that Section 40(3) of the Act is arbitrary and violative of Article 14 of the Constitution of India to the above extent.

20. In response, the learned ASG submitted that the Finance Minister's speech itself seeks to bring to tax all companies in which public are not substantially interested holding land and buildings, not for the purposes of its business, to tax under the Act. It is further submitted that the entire issue stands concluded by the decision of Madhya Pradesh High Court in ***Chunnilal Onkarmal (P) Ltd. and Anr.***

Vs. Union of India & Anr. 1994 SCC Online MP 326. Therefore, there is no basis for the aforesaid challenge.

21. It is a settled position in law that a fiscal legislation relating to tax is not immune to challenge, in case it does not satisfy the test of Article 14 of the Constitution of India. However, in matters of tax legislation the Supreme Court in ***R.K. Garg Vs. Union of India, (1981) 4 SCC 675*** has observed as under:-

> "*law relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, J. that the legislature should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or strait-jacket formula and this is particularly true in the case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joints has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved*."

22. Therefore, Section 40(3) of the Act bringing to tax land and building which is not used for business purposes by companies in which

public are not substantially interested to tax under the Wealth Tax Act and leaving out those land and buildings which are used for business purposes by companies in which public are not substantially interested from the charge of wealth tax under the Act is a reasonable classification. Therefore, the legislation bringing to tax land and buildings owned by the companies in which public are not substantially interested without any reference to the manner in which such companies came into ownership of the land and buildings is a decision taken by the legislature and cannot be faulted on the touchstone of Article 14 of the Constitution of India. The speech of the Finance Minister while introducing the bill points out the mischief which was existing namely persons transferring land and buildings owned by them to closely held companies i.e. companies in which the public are not substantially interested so as to evade payment of wealth tax. Therefore, the legislation to cure the mischief was to bring to tax all companies in which public are not substantially interested to the extent it held land and buildings which are not used for business purposes, without determining the source and manner of acquisition. In fact, the Finance Minister's speech itself indicates that it is proposed to levy wealth tax in case of closely held companies *inter alia* in respect of land and buildings owned by such companies and not used for the business

purposes. The object of introducing the bill was in terms of the Finance Minister's speech not restricted only to bring to tax those companies in which public are not substantially interested to which the land and building has been transferred by its members. The Parliament has decided to bring to tax the land and buildings not used for the purposes of business and owned by the companies in which the public are not substantially interested. The Parliament has thus made a reasonable classification between the companies in which public are substantially interested from the companies in which public are not substantially interested. This classification cannot be found fault with because the petitioners want further classification to have been done by the Parliament. The remedy of the petitioners, if any, in matters such as this, is to have the Parliament to amend the law so as to meet what according to the petitioners would be the most just and appropriate classification, by adding further classification and restricting its applicability only where the assets have not been acquired by the company in which the public are not substantially interested out of its own profits. The legislature has in its wisdom decided that the executive should not be burdened with finding out the manner in which the land and buildings has been acquired by the company, to bring it to tax. The mere fact that there is land and building owned by the

company and it is not used for the purposes of business is sufficient to hold that these assets to be taken into account under Section 40(3) of the Act for the purposes of wealth tax under the Wealth Tax Act.

23. In the above view, the challenge to Section 40(3) of the Act is not sustainable. Therefore, the petition is dismissed. No order as to costs.

24. Needless to state the interim order dated 25th September 1987 passed by this Court restraining the respondent also stands vacated.

(SANDEEP K. SHINDE, J.) **(M.S. SANKLECHA, J.)**