IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA.

CMPMO No. 418 of 2024
Reserved on: 27.09.2024
Decided on: 30th September, 2024

M/s Kundlas Loh Udyog .....petitioner

Versus

Union of India and others ...Respondents

Coram

The Hon'ble Mr. Justice Tarlok Singh Chauhan, Judge.

Whether approved for reporting?[1] Yes.

For the petitioner: **Mr. Shrawan Dogra, Senior Advocate with Mr.Manik Sethi, Mr. Tejasvi Dogra and Mr. Harsh Kalta, Advocates.**

For the respondents: **Mr. Neeraj Sharma and Mr.Ishaan Kashyap, Advocate for respondent No.1.**

None for respondents No.2 and 3.

Tarlok Singh Chauhan, Judge

At the outset, it may be mentioned that this Court is not deciding the factual issues and is confining its findings to the legal issues involve in the instant petition.

2. The instant petition under Article 227 of the Constitution of India has been filed for grant of the following relief:-

[1] *Whether the reporters of Local Papers may be allowed to see the judgment? Yes.*

> *"i. A direction be issued under the Supervisory jurisdiction under the Constitution of India, as pleases to this Hon'ble Court, quash and set-aside the communication dated 08.07.2024 issued by Respondent no. 1 to Respondent no. 2 (Annexure P-4) and the communication numbered as DCIT/CC-Shimla/2024-25/425 issued by Respondent no. 1 to Respondent no. 3, on the basis of which impugned communication dated 10.07.2024 (Annexure P-5) was issued to the petitioner, as illegal, arbitrary and beyond jurisdiction A as so mentioned in Section 226(3) of the Income Tax Act 1961."*

3. The petitioner deals in the work of Iron and Steel for which it purchases raw material and thereafter manufactures the final products as per the demand. As per the petitioner, it has the bank accounts in the nature of "Over Cash Credit" (OCC Account)/ "Cash Credit (CC)" with HDFC bank (respondent No.2) and YES bank (respondent No.3) with the huge debit balance.

4. On 31.05.2023, respondent No.1 served a notice under Section 143(2) of the Income Tax Act 1961 (for short the 'Act') which was duly replied by it. Later on, on 30.12.2023, a show cause notice was issued to the petitioner proposing a huge addition of Rs 237.53 Crores, which according to the petitioner, was 90.43% of sales of the petitioner and around 2.5 times of its assets. Thereafter, in

consequence of the same, an assessment order under Section 143 (3) of the Act was passed on 31.03.2023 along-with a notice of demand under Section 156 of the Act in Form No. 7, in which, the respondents demanded a sum of Rs. 17,07,97,812/- from the petitioner. The petitioner assailed this demand by filing CWP 5321 of 2024 before this Court and this Court granted interim stay with regard to the issue of the "*freight income*" vide order dated 12.06.2024.

5. On 10.07.2024, the employees of the petitioner approached respondents No. 2 and 3 qua the routine transactions undertaken for the business activities of the petitioner, but were informed that there is a communication addressed by respondent No. 1, whereby, the respondent-bank(s) have been asked to seize the account of the petitioner with immediate effect. When the petitioner enquired about the letter/communication/any further details, the respondent No.2-bank refused to supply the same and informed the petitioner that they would be initiating the process of seizing the account of the petitioner with immediate effect. The petitioner, however, somehow, managed to lay its hands over the communication dated 08.07.2024 (received on 10.07.2024) issued by the respondent No. 1 to Respondent No. 2 under Section 226(3) of the Act.

6. Thereafter, after the great persuasion of the petitioner, respondent No. 3 has given a formal intimation regarding the communication received by it from the respondent-department. This communication again is dated 08.07.2024 (Annexure P-4).

7. It is in this background, the instant petition has been filed for the aforesaid relief.

8. Respondent No.1 alone has contested the petition by filing its reply, wherein, number of preliminary objections regarding maintainability, the petitioner having deliberately not disclosed the material facts, the petition being not maintainable in view of the decision of this Court in CWP No.5321 of 2024 etc. have been raised. On merits, the factual matrix has not been denied. However, it has been contended that respondent No.1 is well within its right to attach the OCC/OD/CC accounts "*credit balance*" which may be treated as a saving account and the account of "*credit balance*" can also be attached. It is averred that the petitioner itself has not placed any material on record which may show that the attached account had a '*debit balance or credit balance'*.

9. The petitioner filed rejoinder to the reply filed by respondent No.1, wherein, it is reiterated that the writ petition is maintainable as respondent No.1 is a quasi judicial

authority and is bound to follow the mandate of law under Section 226(3) of the Act. It is averred that filing of CWP No.5321/2024 has nothing to do with the issue in the instant case and the moot question is whether respondent No.1 can attach the current account?

10. I have heard learned counsel for the parties and have also gone through the records.

11. It would be evident from the pleadings of the parties that the moot issue, in the instant case, is whether the accounts which are in the nature of Cash Credit Accounts can be attached and that there was any money due to the petitioner from the bank which can be recovered in terms of sub section (3) of Section 226 of the Act?

12. In order to appreciate this issue, it shall be apt to reproduce Section 226(3) of the Act, which reads as under:-

> *"(3) (i) The [Assessing Officer or Tax Recovery Officer] may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee, to pay to the [Assessing Officer or Tax Recovery Officer] either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.*
>
> *(ii) A notice under this sub-section may be issued to any person who holds or may subsequently hold any money*

for or on account of the assessee jointly with any other person and for the purposes of this sub-section, the shares of the joint holders in such account shall be presumed, until the contrary is proved, to be equal.

(iii) *A copy of the notice shall be forwarded to the assessee at his last address known to the [Assessing Officer or Tax Recovery Officer], and in the case of a joint account to all the joint holders at their last addresses known to the [Assessing Officer or Tax Recovery Officer].*

(iv) *Save as otherwise provided in this sub-section, every person to whom a notice is issued under this sub-section, shall be bound to comply with such notice, and, in particular, where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book, deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary.*

(v) *Any claim respecting any property in relation to which a notice under this sub-section has been issued arising after the date of the notice shall be void as against any demand contained in the notice.*

(vi) *Where a person to whom a notice under this sub-section is sent objects to it by a statement on oath that the sum demanded or any part thereof is not due to the assessee or that he does not hold any money for or on account of the assessee, then, nothing contained in this sub-section shall be deemed to require such person to pay any such sum or part thereof, as the case may be, but if it is discovered that such statement was false in any material particular, such person shall be personally liable to the [Assessing Officer or Tax Recovery Officer] to the extent of his own liability to the assessee on the date of the notice, or to the extent of the assessee's liability for any sum due under this Act, whichever is less.*

(vii) *The [Assessing Officer or Tax Recovery Officer] may, at any time or from time to time, amend or revoke any notice issued under this sub-section or extend the time for making any payment in pursuance of such notice.*

(viii) *The [Assessing Officer or Tax Recovery Officer] shall grant a receipt for any amount paid in compliance with a*

notice issued under this sub-section, and the person so paying shall be fully discharged from his liability to the assessee to the extent of the amount so paid.

(ix) Any person discharging any liability to the assessee after receipt of a notice under this sub-section shall be personally liable to the [Assessing Officer or Tax Recovery Officer] to the extent of his own liability to the assessee so discharged or to the extent of the assessee's liability for any sum due under this Act, whichever is less.

(x) If the person to whom a notice under this sub-section is sent fails to make payment in pursuance thereof to the [Assessing Officer or Tax Recovery Officer], he shall be deemed to be an assessee in default in respect of the amount specified in the notice and further proceedings may be taken against him for the realisation of the amount as if it were an arrear of tax due from him, in the manner provided in sections 222 to 225 and the notice shall have the same effect as an attachment of a debt by the Tax Recovery Officer in exercise of his powers under section 222."

13. It would be noticed that sub Section (3) of Section 226 of the Act enables the Assessing Officer or the Tax Recovery Officer by notice in writing to require any person from whom money is due or may become due to the assessee or any person who owes or may subsequently owe money for on account of assessee to pay the Assessing Officer or Tax Recovery Officer. Proceedings under sub Section (3) of Section 226 of the Act are in the nature of what is commonly called garnishee proceedings. Attachment of debts is a process by means of which judgment creditor is enabled to reach the money due to a judgment debtor which is in the hands of a third person. These are garnishee proceedings. To

be capable of attachment, there must be in existence at the time when the attachment becomes operative, sometime which the law recognizes '*debt*'. So long as there is debt in existence, it is not necessary that it should be immediately payable. Where any existing debt is payable by future installments, the garnishee order may be made to become operative as and when installment becomes due. The debt must be one which the judgment debtor could himself enforce for his own benefit. The debt is a sum of money which is now payable or will become payable in future by reason of present obligation.

14. In case titled ***K.M. Adam*** vs. ***The Income Tax Officer (1958) 33 ITR 26***, the Madras High Court while dealing with a provisions under Income Tax Act, 1922 was dealing with a case where the bank had afforded the overdraft facility to its customers. The question arose whether the bank account a holds the amount, specified as that up to which the customer may draw is either ' a debtor ' of the customer or holds that money on behalf of or on account of the customer. The question has been answered in the following manner:-

> *".....In my judgment when a Bank lends money on overdraft and the customer is always in debit there is*

no stage at which the Bank is a debtor to its customer, nor and point of time at which it holds any money of his on his account. S. 46(5-A) of the Act cannot on any construction be intended as a credit-freeze, with this feature superadded, that if there was any thawing, the resultant credit released became immediately payable to the department. Of course, if at any stage the account of the customer is in credit, S. 46(5-A) would come into play and the sum so standing to the credit of the assessee might be directed to be paid over…."

15. Similar issue came up for consideration before the learned Division Bench of the Bombay High Court in ***Sangram Foods Pvt. Ltd.*** vs. ***State of Maharashtra 2010 SCC Online Bom 947***. This case had arisen out of Rule 35 of Bombay Provisional Municipal Corporation (Cess on entry of goods) Rules, 1996 and the CC account therein had been attached. Relying upon the judgment of the Madras High Court in *K.M. Adam's* case (supra) and also the decision of the learned Single Judge of the Karnataka High Court in ***Karnataka Bank Limited*** vs. ***Commissioner of Commercial Taxes, 1999 Sales Tax Cases 19***, it was observed that the account in question being a Cash Credit Account, which in other words is a overdraft facility, the unutilized overdraft account does not render the banker the debtor in any sense and the banker is, therefore, not a person

from whom money is due to the customer. It was further observed that where the banker lends money on an overdraft and the customer is always in debit there is no stage at which the banker is debtor to the customer, nor at any point of time at which he holds any money of the customer or the latter's account.

16. Thereafter, identical question as involved in the instant case came up for consideration before a learned Single Judge of the Calcutta High Court in ***Jugal Kishore Das*** vs. ***Union of India and others, 2013 SCC Online Cal 19941***. Here, the petitioner like the instant case, had challenged the order of attachment of Cash Credit Account held with the bank. The sheet anchor of the argument was that the authority while invoking the provisions contained under Section 226(3) of the Act, cannot pass an order of attachment of Cash Credit account, which has not been utilized or availed of as yet. Concurring with the view taken by the Madras High Court in K.M. Adam's case (supra), it was held that unless there exists a relationship of 'debtor and creditor' the order of attachment by an authority under the provisions contained under Section 226(3) of the said Act cannot be passed. It was further held that the Cash Credit limit is a facility provided by the bank to its customers to use

and utilize the money; and if such facility availed of, it would attract the interest to be charged for the same so utilized. Lastly, it was held that the meaningful reading of the language employed in Section 226(3) of the Act does not suggest that the account like the Cash Credit or the overdraft is capable of being attached as the bank does not become a debtor.

17. Identical issue, like the one involved in the instant case, thereafter, came up for consideration before the learned Division Bench of the Gujarat High Court in ***Kaneria Granitio Ltd.*** vs. ***Assistant Commissioner IT, 2016 SCC Online Guj 10313*** wherein, it was held that unless there exists a relationship of 'debtor and creditor' the order of attachment by an authority under the provisions contained under Section 226(3) of the said Act cannot be passed. It was further held that the Cash Credit limit is a facility provided by the bank to its customers to use and utilize the money; and if such facility availed of, it would attract the interest to be charged for the same so utilized.

18. It shall be apt to reproduce relevant observations as contained in paras 3 to 10 of the judgment, which read as under:-

"3. Case of the petitioner is that such accounts were either in the nature of cash credit account or term loan account and that, therefore, it cannot be stated that there was any money due to the petitioner from the bank which can be recovered in terms of sub section (3) of Section 226 of the Act.

4. Having heard learned counsel for the parties and having perused the materials on record we may notice that Section 226 of the Act pertains to other modes of recovery. Under sub section (1) of Section 226, where no certificate, as mentioned in Section 222 of the Act, is drawn up, the Assessing Officer may recover the tax by one or more of the modes provided in this section. The portion of Section 226, which is relevant for our purpose, reads as under:

> *"(3) (i) The [Assessing] Officer [or Tax Recovery Officer] may, at any time or from time to time, by notice in writing require any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the [Assessing] Officer [or Tax Recovery Officer] either forthwith upon the money becoming due or being held or at or within the time specified in the notice (not being before the money becomes due or is held) so much of the money as is sufficient to pay the amount due by the assessee in respect of arrears or the whole of the money when it is equal to or less than that amount.*
>
> *(ii) A notice under this sub section may be issued to any person who holds or may subsequently hold any money for or on account of the assessee jointly with any other person and for the purposes of this sub section, the shares of the joint holders in such account shall be presumed, until the controversy is proved, to be equal.*
>
> *(iii)….*
>
> *(iv) Save as otherwise provided in this sub section every person to whom a notice is issued under this sub section shall be bound to comply with such notice and in particular where any such notice is issued to a post office, banking company or an insurer, it shall not be necessary for any pass book,*

deposit receipt, policy or any other document to be produced for the purpose of any entry, endorsement or the like being made before payment is made, notwithstanding any rule, practice or requirement to the contrary."

5. Under clause (i) of sub section (3) of section 226, the Assessing Officer has power to issue notice requiring any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee to pay to the Assessing Officer forthwith upon the money becoming due or being held or within the specified time, so much of the money as is sufficient to pay the amount due by the assessee in respect of the arrears or the whole of the money when it is equal to or less than the amount of arrears. In other words, in the process of seeking coercive recovery, the Assessing Officer would have power to recover the same to the extent of the arrears of the assessee from any person from whom money is due or may become due to the assessee or any person who holds or may subsequently hold money for or on account of the assessee. This power is essentially in the nature of garnishee order requiring the debtor of the assessee to make direct payment to the Assessing Officer of the arrears of tax instead of paying over such amount to the assessee. In essence, therefore, this power would be available when there is person from whom money is due or may become due to the assessee or there is a person who holds or may subsequently hold for or on account of the assessee any money.

6. In this case, admittedly, all the three bank accounts were in the nature of either the cash credit account or term loan account. In other words, the accounts were opened to enable the assessee to borrow the money from the bank for the purpose of its business. Any money, therefore, that the bank may make available to the assessee would necessarily be in the nature of a loan or a cash credit facility, in either case, would be in the nature of borrowing by the assessee from the bank. The bank and the assessee, therefore, do not have the debtor-creditor relationship.

7. Somewhat similar situation arose before the learned Single Judge of Madras High Court in case of K.M.Adam vs. Income Tax Officer, II Additional II Circle,

Madra reported in 33 ITR 26. The Assessing Officer desired to invoke powers analogous to Section 226(3) of the Act for recovery of the tax dues of the assessee from the overdraft account that the assessee maintained with its bank. In such background, referring to similar provisions contained in Section 46 of the Income Tax Act, 1922, it was observed as under:

> *"It will be seen that this provision is analogous to an attachment of a debt or what is commonly terms a garnishee summons. The classes of persons to whom such notice could be served are two: (i) any person from whom money is due or may become due to the assessee; and (2) any person who holds or may subsequently hold money for or on account of the assessee. The question which arises for consideration in the present case is, as to whether a bank, which has afforded overdraft facilities to its customer, holds the amount, specified as that up to which the customer may draw as either "a debtor" of the customer or holds that money on behalf of or on account of the customer."*

8. This decision was followed by the learned Single Judge of Bombay High Court in reported judgement of Calcutta High Court in case of Jugal Kishore Das dated 08.10.2013. In the said case, the Assessing Officer had tried to recover the tax dues of the assessee in exercise of powers under Section 226(3) of the Act by attaching the cash credit account of the assessee. Following the decision of Madras High Court in case of K.M.Adam vs. Income Tax Officer, II Additional II Circle, Madra(supra), it was observed as under:

> *"In view of the above, this Court does not find that the action on the part of the respondents in passing the order of attachment of Cash Credit Account would at all be sustainable in view of the ratio laid down in the above noted report; even the meaningful reading of the language employed in Section 226(3) of the said Act does not suggest that the account like the Cash Credit or the Overdraft is capable of being attached as the bank does not become a debtor."*

9. The Division Bench of Bombay High Court in case of M/s. Sargam Foods Pvt. Ltd. vs. State of Maharastra in the judgment dated 08.07.2010 also considered the similar issue and set aside the attachment of the

> *petitioner's cash credit account for recovery of the unpaid taxes.*
>
> *10. Such being the consistent view of various High Courts of the country, we have no hesitation in adopting similar line, also looking to the phraseology used in the statutory provisions contained in sub section (3) of Section 226.*

19. The aforesaid view of the Gujarat High Court has been followed by the learned Division Bench of the Punjab and Haryana High Court in ***Bindal Smelting Pvt. Ltd.*** vs. ***ADG, GST Intelligence, 2019 SCC Online P&H 7790*** and the same has also been relied upon by the learned Division Bench of the same High Court in ***Manish Scrap Traders*** vs. ***Principal Comm. 2022 SCC Online Guj 2585***.

20. No judgment taking a contrary view has been cited by respondent No.1 and I myself see no reason to take a different view of the matter.

21. Accordingly, the question, as framed above, is answered that mere providing a facility of an overdraft, it cannot be said that the bank is a debtor to its customers or holds the money for account of its customers, nor any point of time at which it holds any money of his on his account. The Cash Credit limit is a facility provided by the bank to its customers to use and utilize the money and if such facility availed of, it would attract the interest to be charged for the

same so utilized and, therefore, the amount cannot be attached in terms of sub Section (3) of Section 226 of the Act.

22. In this view of the matter, this Court does not find that the action on the part of respondent No.1 in passing the order of attachment of Cash Credit Account would at all be sustainable, in view of the ratio laid down in the above noted judgments; even the meaningful reading of the language employed in Section 226(3) of the Act does not suggest that the account like the Cash Credit or the overdraft is capable of being attached as the bank does not become a debtor. This Court, therefore, finds that the impugned orders of attachment passed by the authorities are clearly beyond the powers conferred under Section 226(3) of the Act and, therefore, are liable to be quashed and set aside.

23. Consequently, in view of the discussion made above, this petition succeeds and the same is allowed. Accordingly, communication dated 08.07.2024 issued by respondent No.1 to respondent No.2 (Annexure P-4) and the communication numbered as DCIT/CC-Shimla/2024-25/425 issued by respondent No.1 to respondent No.3, on the basis of which, impugned communication dated 10.07.2024 (Annexure P-5) are quashed and set aside.

24. Pending applications, if any, shall also stand disposed of.

(**Tarlok Singh Chauhan**)
Judge

September 30, 2024
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