

Before Jaswant Singh & Girish Agnihotri, JJ.

BINDAL SMELTING PVT. LTD. THROUGH ITS DIRECTOR—
Petitioner

versus

ADDITIONAL DIRECTOR GENERAL, DIRECTORATE
GENERAL OF GST INTELLIGENCE—Respondent

CWP-31382-2019

December 20, 2019

Constitution of India, 1950, Article 226—Central Goods and Services Tax Act, 2017, Section 83—Provisional attachment of Over Cash Credit bank account—Protection of interest—Petitioner manufacturing lead ingots, red oxide and grey oxide—Availed Input Tax Credit amounting to Rs. 13.38 Crore during July 2017 to March, 2018 on basis of invoices of 16 suppliers.—Invoices untraceable—Held, respondent can attach account only if there is some balance in form of FDR or savings—Power of attachment of bank account cannot be exercised as per whims and caprices of Authority—Commissioner is bound to ensure that by attachment of property or bank account, interest of revenue is going to be protected—In case a property is mortgaged with bank and value of property is less than outstanding dues of bank, provisional attachment is meaningless and action remains only on paper—Thus, no record showing that interest of revenue is protected by attaching property or bank account—Therefore, order of attachment of account quashed and set aside.

Held, we are of the opinion that Respondent can attach an account only if there is some balance in the form of FDR or savings. The power of attachment of bank account cannot be exercised as per whims and caprices of the Authority. The Commissioner is bound to ensure that by attachment of property or bank account, interest of revenue is going to be protected. In case a property is mortgaged with bank and value of property is less than outstanding dues of bank, provisional attachment is meaningless and action remains only on paper. In the absence of record showing that interest of revenue is protected by attaching property or bank account, action deserves to be declared as taken without application of mind and formation of opinion on the basis of cogent material. Thus, attachment of current account having debit balance does not protect interest of revenue, instead

merely ruins the business of a dealer. Such an action of attachment of “over cash credit” account for the sake of recovery of confirmed demand, may in some peculiar case, may be still permitted but not at the stage of pending investigation.

(Para 27)

Jagmohan Bansal, Advocate
for the Petitioner.

Sourabh Goel, Advocate
for the respondent.

JASWANT SINGH, J.

(1) The Petitioner, a limited company, through instant petition under article 226 of Constitution of India is seeking quashing of order dated 10.07.2019 (**Annexure P-8**) and order dated 12.09.2019 (**Annexure P-10**) passed by Additional Director General, Gurugram-Respondent in exercise of power conferred under Section 83 of Central Goods and Services Tax Act, 2017 (for short ‘CGST Act, 2017’) whereby Respondent has provisionally attached bank account of the Petitioner. It has been further prayed that Respondent may be restrained from taking coercive steps against the Petitioner and its Directors/employees.

(2) The brief facts necessary to adjudicate controversy involved as emerging from record are that the Petitioner is manufacturing lead ingots, red oxide and grey oxide. On 27.03.2018, officials of Respondent/GST Directorate searched premises of the Petitioner and during search seized record. The Respondent time to time directed Petitioner to supply different documents which Petitioner supplied but failed to provide transporter bilty and weighment slips. The Respondent recorded statements of officials of Petitioner and conducted further investigation. The Respondent during investigation found that Petitioner has purchased scrap batteries from different suppliers which included 16 suppliers, who are not traceable. The Petitioner during July’ 2017 to March’ 2018 had availed Input Tax Credit (for short ‘ITC’) amounting to Rs.13.38 Crore on the basis of invoices of 16 suppliers, who are not traceable.

(3) The Respondent vide order dated 10.07.2019 (**Annexure P-8**) provisionally attached Over Cash Credit (for short ‘OCC’) Account of the Petitioner, which they are maintaining with Lakshmi Vilas Bank, Karol Bagh, New Delhi. The Petitioner in terms of Rule 159 of CGST

Rules, 2017 made a representation to the Respondent, who vide communication dated 23.10.2019 declined to accede request of the Petitioner to lift attachment of bank account. Hence the instant petition is filed.

(4) Mr. Bansal, counsel for the Petitioner contended that account in question is an OCC Account and Petitioner till date had utilized credit limit to the tune of Rs. 6.42 Crore, thus there is debit balance in the account and its attachment amounts to closure of business because in the present era it is not possible to carry on business activities without bank account. Section 83 of CGST Act read with Rule 159 of CGST Rules, 2017 permits attachment to protect interest of revenue and not to close business of any entity. As there is debit balance in the account, thus there is no question of protection/securing interest of revenue. The Petitioner during GST regime has availed ITC amounting to Rs.60.89 Crore and paid GST amounting to Rs.62.45 Crore. The Petitioner is a running unit and more than 100 families are dependent upon the unit and its closure would deprive a source of livelihood to these families. Till date, no show cause notice has been issued under Section 73 or 74 of the CGST Act, thus any demand prior to show cause notice and its adjudication is bad and beyond the jurisdiction of Respondent.

(5) Mr. Sourabh Goel, counsel for the Respondent contended that the Petitioner has not actually purchased inputs from 16 suppliers and these suppliers are not traceable, thus Petitioner is liable to pay ITC amounting to Rs.13.38 Crore, which has been wrongly availed. As per investigation, the scrap batteries have been purchased from unorganized/unregistered persons backed with fake invoices and bogus transport details. The bank account has been attached only to safeguard the interest of government revenue and contention of Petitioner that attachment of account amounts to closure of business is untenable. Once the legislature has provided for attachment of bank account, the same cannot be called to be in violation of Article 14, 19(1) (g) and 21 of the Constitution of India.

(6) The only grievance of Petitioner is that their OCC account has been attached which amounts to closure of their business. We are not adverting with other prayers of the Petitioner and confine our findings to attachment of OCC account.

(7) The conceded position as emerging from the record is that the Petitioner is a running manufacturing unit and account in question is a OCC account having debit balance of Rs.6.42 Crore. The

investigation is going on and show cause notice under Section 73 or 74 would be issued after its completion. The Respondent in exercise of power under Section 83 of CGST Act, 2017 has attached bank account to safeguard interest of revenue.

(8) After having scrutinized record of the case and hearing arguments of Counsel of both sides, we find that Respondent has power to attach property and bank account of any taxable person to protect interest of revenue. Person aggrieved may make representation against attachment of property or bank account and Commissioner after affording opportunity of hearing is bound to decide representation in one or another way. Section 83 of CGST Act and Rule 159 of CGST Rules are reproduced as under:

SECTION 83. Provisional attachment to protect revenue in certain cases. — (1) Where during the pendency of any proceedings under section 62 or section 63 or section 64 or section 67 or section 73 or section 74, the Commissioner is of the opinion that for the purpose of protecting the interest of the Government revenue, it is necessary so to do, he may, by order in writing attach provisionally any property, including bank account, belonging to the taxable person in such manner as may be prescribed.

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

RULE 159 PROVISIONAL ATTACHMENT OF PROPERTY:

(1) Where the Commissioner decides to attach any property, including bank account in accordance with the provisions of section 83, he shall pass an order in FORM GST DRC-22 to that effect mentioning therein, the details of property which is attached.

(2) The Commissioner shall send a copy of the order of attachment to the concerned Revenue Authority or Transport Authority or any such Authority to place encumbrance on the said movable or immovable property, which shall be removed only on the written instructions from the Commissioner to that effect.

(3) Where the property attached is of perishable or hazardous nature, and if the taxable person pays an amount equivalent to the market price of such property or the amount that is or may become payable by the taxable person, whichever is lower, then such property shall be released forthwith, by an order in FORM GST DRC-23, on proof of payment.

(4) Where the taxable person fails to pay the amount referred to in sub-rule (3) in respect of the said property of perishable or hazardous nature, the Commissioner may dispose of such property and the amount realized thereby shall be adjusted against the tax, interest, penalty, fee or any other amount payable by the taxable person.

(5) Any person whose property is attached may, within seven days of the attachment under sub-rule (1), file an objection to the effect that the property attached was or is not liable to attachment, and the Commissioner may, after affording an opportunity of being heard to the person filing the objection, release the said property by an order in FORM GST DRC-23.

(6) The Commissioner may, upon being satisfied that the property was, or is no longer liable for attachment, release such property by issuing an order in FORM GST DRC-23.

(9) From the reading of above provisions, we find that during the pendency of any proceedings under Section 62 (assessment of non-filers of returns) or Section 63 (assessment of unregistered persons) or Section 64 (summary assessment) or Section 67 (inspection, search and seizure) or Section 73 (determination of tax not paid otherwise than fraud) or Section 74 (determination of tax not paid on account of fraud), the Commissioner may provisionally attach any property including bank account. The power of attachment is not absolute. The attachment is subject to following safeguards:

- i) Order should be passed by Commissioner;
- ii) Proceeding under Section 62 or 63 or 64 or 67 or 73 or 74 should be pending;
- iii) Commissioner must form an opinion
- iv) Order should be passed to protect interest of revenue.

v) It must be necessary to attach property.

(10) Expression ‘is of the opinion’ or ‘has reason to believe’ are of same connotation and are indicative of subjective satisfaction of Commissioner, which depends upon facts and circumstances of each case. It is settled law that ‘opinion’ must have a rational connection with or relevant bearing on the formation of the opinion. Rational connection postulates that there must be a direct nexus or live link between the protection of interest and available property which might not be available at the time of recovery of taxes after final adjudication of the dispute.. The opinion must be formed in good faith and should not be a mere pretence. Courts are entitled to determine whether the formation of opinion is arbitrary, capricious or whimsical. Expression ‘necessary’ must also be taken care of. From the order and record, it must come out that actually it was necessary to take drastic action of attachment.

(11) We find it appropriate to refer to similar provisions of provisional attachment under Section 226(3) and 281B of the Income Tax Act, 1961 and available case law before adverting to the provisions of Section 83 of CGST Act, 2017 and facts of the instant case.

(12) As per Section 226 (3) of Income Tax Act, 1961 an Assessing Officer or Tax Recovery Officer may 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.

(13) As per Section 281B of Income Tax Act, 1961 the assessing officer 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, for the purpose of protecting the interest of revenue may by order in writing provisionally attached any property. The Assessing Officer must be of the opinion that it is necessary to do so.

(14) While dealing with power of attachment of property under Section 281B of Income Tax Act, Bombay High Court in the case of ***Gandhi Trading versus Assistant Commissioner of Income Tax***¹ in Para 7 has observed as under:

“We have considered the suggestion of the Joint

¹ (1999) 239 ITR 337 (Bom.)

Commissioner of Income Tax. We are, however, not impressed by the same. Attachment has been made in this case under Section 281B of the Act which provides for provisional attachment only to protect the revenue in certain cases. This Section reads as follows:

“281B. Provisional attachment to protect revenue in certain cases

(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.

(15) It is clear from a plain reading of the above Section that it is intended to empower the Assessing Officer to make a provisional attachment of any property of the assessee during the pendency of any proceedings or assessment or reassessment of any income, even though there is no demand outstanding against the assessee, if he is of the opinion that it is necessary to do so to protect the interests of the Revenue. To ensure that this power is not misused, a number of safeguards have been provided in the Section itself. It is not necessary for us, at this stage, to examine the same. One thing is clear that this power should be exercised by the Assessing Officer only if there is a reasonable apprehension that the assessee may thwart the ultimate collection of the demand that is likely to be raised on completion of the assessment. The power of attachment under this Section is in the nature of attachment before judgment under the Code of Civil Procedure. It is a drastic power. It should, therefore, be exercised with extreme care and caution. It should not be exercised unless 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 thwart the ultimate collection of the demand. Moreover, attachment should be made of the properties and to the extent it is required to achieve the

above object. It should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee. Attachment should be made as far as possible of immovable properties if that can protect the Revenue. Attachment of bank accounts and trading assets should be resorted to only as a last resort. In any event, attachment under Section 281B should not be equated with attachment in the course of recovery proceedings.”

(16) In exercise of power conferred by Section 226(3) of Income Tax Act, 1961 Assessing Officers time and again attached cash credit or over draft or loan account of the defaulter assessee. Matter time to time came up for consideration before High Courts and it was held that cash credit or over draft or loan account cannot be attached because there is no balance of assessee. Gujarat High Court in the case of ***Kaneria Granito Ltd.*** versus ***Assistant Commissioner of Income Tax***² after noticing law enunciated by different high courts has quashed attachment notice issued under Section 226 of Income Tax Act, 1961 to the Allahabad Bank to pay the department Rs.5.86 Crore even though accounts maintained were cash credit or term loan accounts. The relevant findings are extracted below:

“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

² 2016 241 Taxman 315 (Gujarat)

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."

(17) 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.

(18) 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.

(19) Somewhat similar situation arose before the learned Single Judge of Madras High Court in case of *K.M. Adam* versus *ITO*³. 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.'

(20) 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* versus *Union of India* [W.P. No. 22899 of 2013, dated 8-10-2013]. 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* (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

³ (1958) 33 ITR 26

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."

(21) Division Bench of Bombay High Court in case of *Sargam Foods (P.) Ltd. versus State of Maharashtra* [WP No. 4313 of 2008, dated 8-7-2010] also considered the similar issue and set aside the attachment of the petitioner's cash credit account for recovery of the unpaid taxes.

(22) 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.

(23) In the result, impugned notice of attachment dated 15.09.2014 is set aside. Petition is disposed of accordingly."

[Emphasis supplied]

(24) Gujarat High Court while dealing with question of provisional attachment of property and bank account in the case of *Valerius Industries versus Union of India*⁴ in Para 52 has concluded as under:

“ 52. Our final conclusions may be summarized as under:

(1) The order of provisional attachment before the assessment order is made, may be justified if the assessing authority or any other authority empowered in law is of the opinion that it is necessary to protect the interest of revenue. However, the subjective satisfaction should be based on some credible materials or information and also should be supported by supervening factor. It is not any and every material, howsoever vague and indefinite or distant remote or farfetching, which would warrant the formation of the belief.

(2) The power conferred upon the authority under Section 83 of the Act for provisional attachment could be termed as a very drastic and far-reaching power. Such power should

⁴ 2019-TIOL-2094-HC-AHM-GST

be used sparingly and only on substantive weighty grounds and reasons.

(3) The power of provisional attachment under Section 83 of the Act should be exercised by the authority only if there is a reasonable apprehension that the assessee may default the ultimate collection of the demand that is likely to be raised on completion of the assessment. It should, therefore, be exercised with extreme care and caution.

(4) The power under Section 83 of the Act for provisional attachment should be exercised only if there is sufficient material on record to justify the satisfaction that the assessee is about to dispose of wholly or any part of his / her property with a view to thwarting the ultimate collection of demand and in order to achieve the said objective, the attachment should be of the properties and to that extent, it is required to achieve this objective.

(5) The power under Section 83 of the Act should neither be used as a tool to harass the assessee nor should it be used in a manner which may have an irreversible detrimental effect on the business of the assessee.

(6) The attachment of bank account and trading assets should be resorted to only as a last resort or measure. The provisional attachment under Section 83 of the Act should not be equated with the attachment in the course of the recovery proceedings.

(7) The authority before exercising power under Section 83 of the Act for provisional attachment should take into consideration two things: (i) whether it is a revenue neutral situation (ii) the statement of "output liability or input credit". Having regard to the amount paid by reversing the input tax credit if the interest of the revenue is sufficiently secured, then the authority may not be justified in invoking its power under Section 83 of the Act for the purpose of provisional attachment.”

(25) Applying the above quoted provisions of CGST Act, 2017 and taking cue from afore-cited judgments of Gujarat High Court, which has noticed consistent judicial pronouncement and Bombay High Court, we find that in the present case attached account is Over Cash Credit account and Petitioner had debit balance of Rs.6.42 Crore,

thus question arises that whether continuation of attachment would protect interest of revenue or not. The Petitioner is running unit and more than 100 families are dependent upon Petitioner. Till date no proceedings under Section 74 of CGST Act are pending which would start as soon as show cause notice is issued. The Respondent has seized record of the Petitioner who has further supplied various documents as well put personal appearance through Directors and employees.

(26) The object and intention of legislature to endow Commissioner with power of attachment under Section 83 is very clear. It is drastic and far-reaching power which must be used sparingly and only on substantive weighty grounds and reasons. The power should be exercised only to protect interest of revenue and not to ruin business of any taxable person. Primarily Section 83 permits to attach property. Property means an asset which may be movable, immovable, tangible, intangible or in the form of some instrument. Cash in hand as well bank account is property, in the form of liquidity which is better than immovable property and directly affects working in the form of working capital of a dealer. A dealer may be having cash in hand or in account in the form of fixed deposit or saving account. The mandate of Section 83 in our considered opinion is to attach amount lying in an account in the form of FDR or saving and it cannot be intention or purport of Section 83 to attach an account having debit balance. No purpose leaving aside securing interest of revenue is going to be achieved except closure of business which cannot be permitted unless and until running of business itself is prohibited by law. The contention of Respondent that they have power to attach bank account irrespective of nature of account cannot be countenanced.

(27) We are of the opinion that Respondent can attach an account only if there is some balance in the form of FDR or savings. The power of attachment of bank account cannot be exercised as per whims and caprices of the Authority. The Commissioner is bound to ensure that by attachment of property or bank account, interest of revenue is going to be protected. In case a property is mortgaged with bank and value of property is less than outstanding dues of bank, provisional attachment is meaningless and action remains only on paper. In the absence of record showing that interest of revenue is protected by attaching property or bank account, action deserves to be declared as taken without application of mind and formation of opinion on the basis of cogent material. Thus, attachment of current account having debit balance does not protect interest of revenue,

instead merely ruins the business of a dealer. Such an action of attachment of “over cash credit” account for the sake of recovery of confirmed demand, may in some peculiar case, may be still permitted but not at the stage of pending investigation.

(28) This court in *Akhil Krishan Maggu* versus *Deputy Director and others*, CWP No. 24195/2019, vide order dated 15/11/2019 has dealt at length with question of arrest under Section 69 read with 132 of CGST Act, 2017 during the pendency of investigation. In the present case, investigation was initiated in March’ 2018 and Directors of the Petitioner have already put their appearance and tendered their statements. Petitioner is a running unit and its record was either seized or subsequently submitted to Respondent, thus we are sanguine of the fact that Respondent shall proceed against the Petitioner in accordance with our judgement dated 15.11.2019 in the case of Akhil Krishan Maggu Vs Deputy Director and others, CWP No. 24195/2019.

(29) In the backdrop of above, we are of the opinion that impugned order dated 10.07.2019 (**Annexure P-8**) and order dated 12.09.2019 (**Annexure P-10**) in the teeth of intent and purpose of Section 83 of CGST Act, 2017 is bad and present petition deserves to succeed and accordingly **allowed**. The impugned orders dated 10.07.2019 (**Annexure P-8**) and order dated 12.09.2019 (**Annexure P-10**) are hereby quashed and set aside.

Ritambhra Rishi