
(2013) 04 AHC CK 0151

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 1182 of 2007

S.K.Agarwal

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 05-04-2013

Acts Referred:

Income Tax Act, 1961 — Section 226(3)

Citation : (2013) 04 AHC CK 0151

Hon'ble Judges : Prakash Krishna, J and Ram Surat Ram (Maurya), J

Final Decision : Disposed Of

Judgement

Prakash Krishna, J.

The petitioner, at the material time, was posted as senior manager of Kamla Nagar Branch of Canara Bank at Agra when he was served with a notice dated 5th of September, 2005 issued under section 226 (3) of the Income Tax Act, 1961 (hereinafter referred to as the Act) by Tax Recovery Officer (Central), Kanpur for attaching the accounts of three persons namely (1) Mukesh Kumar Agrawal, proprietor of M/s. Singhal Casting Company Limited, (2) Sardar Paramjeet Singh and (3) M/s. Shivangi Steel Private Limited. It was stated that a sum of Rs.41,43,342/ with interest is due from Mukesh Kumar Agrawal, the assessee, on account of income tax dues. It was directed to pay the said sum forthwith. Promptly, the petitioner submitted a reply on 8th of September, 2005 stating that M/s. Singhal Casting Company and M/s. Shivangi Steel Private Limited are enjoying open cash credit limits with the bank and are indebted to the bank. Sardar Paramjeet Singh is not having any account with the bank. The above attachment notice referred to above hereinafter is called as first notice.

Subsequent thereto, the Branch Manager, Canara Bank was served with another notice (hereinafter called as second notice) under section 226(3) of the Act dated 22.2.2006 requiring the Branch Manager to pay to the Tax Recovery Officer forthwith any amount due from to or held by the noticee for or on account of the assessee namely M/s. Singhal Casting Company.

On 8th of August, 2006 the Tax Recovery Officer (Central), Kanpur issued a fresh notice under section 226 (3) of the Act, Annexure15 to the writ petition, (hereinafter referred to as the third notice) informing the Branch Manager, Canara Bank under section 226(3) of the Income Tax Act that a sum of Rs.41,43,342 + interest is due from Sri Mukesh Kumar Agrawal, proprietor of M/s. Singhal Casting Co. Ltd.

The reply was given by the petitioner and the bank, which were not found satisfactory. Thereafter, a show cause notice dated 7.6.2006 was issued for non compliance of the letter and notice issued under section 226 (3) dated 22.2.2006 to the petitioner as to why he should not be treated assessee in default equal to the amount allowed by him to withdrawal from the account of M/s. Shivangi Steel Private Limited and M/s. Singhal Casting Co. (the assessee) on account of income tax liability requiring the branch manager under section 226 (3) of the Income Tax Act to pay forthwith any amount due from him or held by him for, on account of the said assessee.

The Tax Recovery Officer after consideration of the reply furnished by the petitioner by impugned order dated 26.6.2007 declared the petitioner deemed to be an assessee in default as he was posted as manager of Canara Bank at Kamla Nagar Branch at the time of service of notice under section 226 (3) dated 22.2.2006, in respect of the amount of Rs.36,11,720/ (Tax as on the date Rs.28,59,391/ + interest under section 220(2) as on the date). It has further provided that the notice dated 22.2.2006 shall have the same effect as attachment of debt by the Tax Recovery Officer in exercise of his powers under section 222 of the Income Tax Act, 1961. Challenging the aforesaid order, the present writ petition has been filed.

A counter affidavit has been filed by the Income Tax Department wherein it has been stated that on 5th of September, 2005, three separate notices were issued to the then branch manager of Canara Bank in respect of Sri Mukesh Kumar Agrawal, Proprietor of M/s. Singhal Casting Company, Sardar Paramjeet Singh and M/s. Shivangi Steel Private Limited. These notices were prepared and issued in statutory format. The amounts due from the defaulter assessee were mentioned in the prescribed column. Further case is, there was a credit balance of Rs.94,031.04 on 8th of September, 2005 in the Saving Bank Account no.9319 of Sri Mukesh Agrawal and as per section 226 (3) of the Act the petitioner was required to remit the said amount of Rs.94,031.04 to the Income Tax Department and also required to stop all the debits from the account. But the petitioner did not comply with the notice under section 226(3) of the Act dated 5th of September, 2005. The notice dated 22.2.2006 (the second notice) was issued for or on account of defaulter assessee namely Sri Mukesh Agrawal and his proprietorship Firm M/s. Singhal Casting Company. The factum of filing of Civil Misc. Writ Petition No.1341 of 2005 and 1356 of 2005 by the defaulter seeking the stay of recovery till the disposal of the stay application or the appeal has also been mentioned. Further, it has been pleaded that the Saving Bank

Account No.9319 in the name of Mukesh Agrawal and cash credit account in the name of his proprietary Firm M/s. Singhal Casting Company should not have been clubbed by the petitioner for the purposes of notice issued under section 226(3) of the Act. Along with the counter affidavit a copy of the notice under section 226 (3) dated 5th of September, 2005 for Shivangi Steels Private Limited has been annexed. The stand taken in the counter affidavit in brief is that in pursuance of the second notice dated 22.2.2006 under section 226 (3) of the Act, the Saving Bank Account no.9319 of Sri Mukesh Agrawal should have been attached and he should not have been permitted to operate the same. Further, no lien is recorded over the said account by the bank and as such, the petitioner is deemed assessee in default as he failed to comply with the second notice dated 22.2.2006.

Heard Sri Ashok Bhatnagar, learned counsel for the petitioner and Sri Dhananjai Awasthi, learned standing counsel for the department. The Court was taken through all the three notices issued from time to time under section 226(3) of the Act and it was submitted that the first notice dated 5th September, 2005 was not pursued any further by the department as no show cause notice etc. was given treating the petitioner as deemed assessee in default qua this notice. The notice shall be deemed to have been waived. The impugned order and the correspondence entered into in between the petitioner and bank on one hand and the respondent no.2 i.e. the Tax Recovery Officer, would show that the impugned order has been passed on the basis of the alleged non compliance of the second notice dated 22.2.2006. The said notice is in respect of M/s. Singhal Casting Co.. M/s. Singhal Casting Company had a debit balance of Rs.65,70,527.71 on 22.2.2006. The account holder was enjoying the open cash credit facility from the bank. The account number is GA 15016 of M/s. Singhal Casting Company. The respondent no.2 was informed about this factual position but wrongly proceeded to hold the petitioner deemed assessee in default. He has proceeded on the footing that at some point of time subsequent to 22.2.2006 there was a credit balance in the Saving Bank Account of Mukesh Kumar Agrawal being account no.9319. The submission is that the second notice does not purport to attach the Saving Bank Account of Mukesh Kumar Agrawal. Even otherwise also, submission is that the bank had a general lien over all the accounts in view of the open cash credit facility granted to M/s. Singhal Casting Company Limited, including the Saving Bank Account No.9319. By the third attachment notice under section 226(3) of the Act which is dated 8th of August, 2006, the Branch Manager of Canara Bank was informed that a sum of Rs.41,43,342 + interest is due from Mukesh Kumar Agrawal, proprietor of M/s. Singhal Casting Company. Therefore, the petitioner who was subsequently transferred from the present branch could not be held deemed assessee in default.

The second limb of the argument the petitioner is that the petitioner after service of the impugned order dated 26th of June, 2007 inquired from Mukesh Kumar Agrawal, Proprietor of M/s. Singhal Casting Company about the status of their

case/appeal in respect of which the petitioner has been treated as assessee in default. Sri Mukesh Kumar Agrawal has handed over a copy of the order dated 28.2.2007 passed by the Income Tax Appellate Tribunal in respect to the block period 1st of April, 1989 to 16th of February, 2000. The matter is pending and subjudice before the CIT (Appeals) in pursuance of the order passed by the Income Tax Appellate Tribunal vide para 38 of the writ petition.

Mukesh Kumar Agrawal, proprietor of M/s. Singhal Casting Company has also moved an application for settlement of the case under section 243 C (1) of the Act in the Settlement Commission, New Delhi on 28th of May, 2007 and has deposited a sum of Rs.8,70,000/ before the Settlement Commission on 25th of July, 2007. Reliance was placed on para 39 of the writ petition.

Lastly, it was submitted that in any case, the petitioner cannot be held personally liable. He was discharging the duties as an officer of the bank. He has acted in the light of the instructions issued by the Head Office from time to time. Submission is that no personal liability can be fastened on the petitioner who has discharged the duties in the official functioning of the bank for which he cannot be made personally liable.

In reply, the learned counsel for the department submitted that on a true and correct reading of the second notice dated 22.2.2006, it would be clear that through this notice, the branch manager, Canara Bank was required to attach the account of Mukesh Kumar Agrawal as his name finds mention in the notice though as proprietor of M/s. Singhal Casting Company. Submission is that the Saving Bank Account of Mukesh Kumar Agrawal was not within the purview of open cash credit facility granted to M/s. Singhal Casting Company and as such, the impugned order holding that the petitioner is deemed assessee in default is correct. The petitioner in view of section 226(3) (ix) is personally liable.

Considered the respective submissions of the learned counsel for the parties and perused the record. At the very outset it may be stated in the present case, we are concerned with the recovery of income tax dues from the assessee namely M/s. Singhal Casting Co. of which Mukesh Kumar Agrawal is proprietor.

On the respective arguments of the learned counsel for the parties, the following three points fall for determination:

1. What would be the effect of the first garnishee notice dated 5th of September, 2005 issued for recovery of dues from the bank account of Mukesh Kumar Agrawal with the petitioner's bank?
2. Whether the impugned order holding the petitioner deemed assessee in default under section 226 of the Act is legally sustainable or not, in view of the fact that no sum was due from the bank to M/s. Singhal Casting Company, as the bank had given open cash credit facility and there was a debit balance of Rs.65,70,527.71 on 22.2.2006 whether the position of the bank was as that of creditor of M/s. Singhal Casting Co.?

3. Whether the petitioner can be held personally deemed assessee in default within the meaning of section 226 of the Act or not?

FIRST POINT.

Taking the first point first, the relevant portion of the first notice dated 5th of September, 2005 (Annexure1) reads as follows:

"A sum of Rs.41,43,342/ plus interest under section 220(2) is due from Sri Mukesh Agarwal (assessee) Prop. M/s. Singhal Casting Co. of D15 Kamla Nagar Agra on account of Incometax/penalty/interest/fine. You are hereby required under section 226(3) of the Incometax Act, 1961, to pay to me forthwith any amount due from you to or, held by you, for or on account of the said assessee upto the amount of arrears shown above.

I also request you to pay any money which may subsequently become due from you to him/them or which you may subsequently hold for or on account of him/them upto the amount of arrears still remaining unpaid, forthwith on the money becoming due or being held by your as aforesaid....."

The said notice was replied by the petitioner on 8th of September, 2005 informing that M/s. Singhal Casting Company and M/s. Shivangi Steel Private Limited are enjoying the open credit limits with the bank and indebted to the bank and bank has general lien.

Thereafter, it appears that being aggrieved by the recovery proceedings, M/s. Singhal Casting Company filed a writ petition no.1356 of 2005 before this Court impleading the Tax Recovery Officer and Branch Manager, Canara Bank as respondents, for quashing of the notice dated 5th of September, 2005 and 13th of September, 2005 issued by the Tax Recovery Officer, Kanpur. The writ petition was allowed in part and it was disposed of with the direction that an early date be fixed by the Commissioner of Income Tax (Appeals) for disposal of the stay application till the orders are passed on the stay application the Tax Recovery Officer, Kanpur shall keep in abeyance the notices dated 5th of September, 2005 and 13th of September, 2005. Subsequently, the Income Tax Appeal was dismissed by the CIT (Appeals).

The respondent no.2 did not proceed further in the matter on the basis of the aforesaid notices dated 5th of September, 2005 and 13th of September, 2005. Instead another notice dated 22.2.2006 was issued. The second notice alleges that a sum of Rs.41,43,342/ plus interest is due from M/s. Singhal Casting Company of which proprietor is Mukesh Kumar Agrawal. The first notice dated 5th of September, 2005 wherein it was stated that the sum is due from Mukesh Kumar Agrawal was not pressed any further. We find sufficient force in the argument of the petitioner's counsel that the first notice dated 5th of September, 2005 was waived and shall be deemed to have been waived in the facts and circumstances of the case.

It is interesting to note that the present writ petition was earlier heard by us on

05.3.2013 and the judgment was reserved. During the course of argument, neither the counsel for petitioner nor the counsel for respondents had advanced any argument on the basis of the first notice and the hearing of the writ petition proceeded and concluded on the basis of the second notice. While preparing the judgment, we could lay our hands on the first notice dated 5th of September, 2005. Thereupon, the matter was refixed for further arguments. This also shows that the respondent department is not placing any reliance upon the said first notice. A perusal of the impugned order would show that the petitioner has been deemed assessee in default on the basis of the second notice dated 22.2.2006. Reference can be made to ultimate paragraph i.e. paragraph 14 of the impugned order. No show cause notice etc. or any further steps was taken by the respondent no.2 with reference to the first notice dated 5th of September, 2005. Therefore, irresistible conclusion is that the notice dated 5th of September, 2005 is of no avail to the respondent department, as it was waived by the conduct of the Tax Recovery Officer.

SECOND POINT.

Now, we take up the second point which, in fact, is the main controversy between the parties. For the sake of convenience, the relevant portions of the second notice dated 22.2.2006 (para S1 and 2) are reproduced below:

"A sum of Rs.41,43,342/ plus interest under section 220(2) is due from M/s. Singhal Casting Co. (Prop. Sri Mukesh Agarwal) (assessee) of D15 Kamla Nagar Agra on account of Incometax/penalty/interest/fine. You are hereby required under section 226(3) of the Incometax Act, 1961, to pay to me forthwith any amount due from you to or, held by you, for or on account of the said assessee upto the amount of arrears shown above.

I also request you to pay any money which may subsequently become due from you to him/them or which you may subsequently hold for or on account of him/them upto the amount of arrears still remaining unpaid, forthwith on the money becoming due or being held by your as aforesaid....."

The argument of the petitioner's counsel is that the said notice is in respect of the dues from M/s. Singhal Casting Company. M/s. Singhal Casting Company had no credit balance and Canara Bank was not the debtor of M/s. Singhal Casting Company. In reply, the learned counsel for the department submitted that the said notice on true and proper consideration is in respect of proprietor Mukesh Kumar Agrawal of M/s. Singhal Casting Company.

From the above quoted portion of the notice, it is crystal clear that the said notice was given in respect of dues from M/s. Singhal Casting Company, proprietor Mukesh Kumar Agrawal. The bank was having a bank account of M/s. Singhal Casting Company being account no. GA 15016 which account had a debit balance of Rs. Rs.65,70,527.71 as on 22.2.2006. The bank in its reply has stated that the subject parties are enjoying open cash credit facility which is granted against hypothecation of stock such as raw material, work in progress, finished

goods and stock in trade. The said facility is extended to a party to meet their working capital requirement. The position of balance on 22.5.2006 (on the date of reply) has been mentioned therein. For the sake of clarity, the relevant portion from the reply of the bank is reproduced below:

"If you go through the clause (vi) of the subsection(3) of section 226 once we inform you that the sum demanded or any part thereof is not due to the subject party from the bank or that we do not hold any money for or on account of the subject party, there is no obligation on our part to pay any such sum or part thereof unless it is discovered that the statement was false in any material particular. Only if the statement is discovered to be false the Act empowers the Assessing Officer/TRO to hold the recipient of the notice personally liable in the matter of the recovery of the demand in question. As such since our statement has not been established to be false in any material aspect, it is submitted that there is no cause for any further action like recovering the amount from the alleged debtor. In the circumstances we request you to withdraw your letter wherein you have threatened further action for which, we submit, you have no support from any provision in the Act. If any further step is taken, in pursuance of your letter dt.17.05.2006, it will be without the authority of law.

In this regard we further clarify that the subject parties are enjoying Open Cash Credit (OCC) facility from our branch. This facility is granted against the hypothecation of stock such as raw materials, work in progress, finished goods and stock in trade. OCC Account is a credit facility extended to a party to meet their working capital requirement. Hence, in general this account will be having debit balance and the credit balance, if any, should be adjusted against the liabilities of the party lying in various accounts. It may be noted that as a creditor bank has a lien on the account in respect of dues of the party. Hence, those who are enjoying OCC facility will be indebted to bank, not vice versa.

On the date of receipt of the notice u/s 226(3) on 22.05.2006 (date) the parties in question owed the bank the following amounts :

Name of the Party

Particulars of account

Credit Limit

Actual Liabilities as on 22.05.06 (in Rs.)

M/s Shivangi Steels Pvt. Ltd.

OCC

Rs.95 Lacs

6450457.71

M/s.Singhal Casting Co.

OCC

Rs. 9.75 Lacs

1290160.77

Regarding your contention that no payments/withdrawals/transfer should have been allowed in the party account, we submit that section 226(3) confer any such power on you. In this regard we invite your attention to the decision of the Madras High Court in the case of Adam (K.M.) vs. Income Tax Officer (33 ITR 26) (Mad.), wherein the Hon"ble High Court has held that

".. when a bank lends money on overdraft and that customer is always in debit balance there is no stage at which the bank is a debtor to its customer, nor any point of time at which it holds any money of his on his account. Section 46(5A) [of Income Tax Act, 1921, similar to section 226 (3) of the Income Tax Act, 1961] of the Act cannot on any construction be intended as a credit freeze, with this feature superadded, that is there was any thawing, the resultant credit released became immediately payable to the Department.."

There appears to be no dispute that there was debit balance in the bank account of M/s. Singhal Casting Company. The said difficulty has been tried to overcome by the respondent no.2 by taking a resort to the Saving Bank Account of Mukesh Kumar Agrawal that is saving bank account No.9319. It would be clear from a perusal of the impugned order that the Tax Recovery Officer has proceeded in the matter on the premise that Mukesh Kumar Agrawal on two occasions i.e. on 8th of May, 2006 and 6th of June, 2006 had credit balance of Rs.20,04,727.44 and Rs.10,02,045.44 respectively in his saving bank account. If the saving bank account and open cash credit account are clubbed together, there would be credit balance.

Firstly, we find that there being no garnishee notice in respect of the saving bank account of Mukesh Kumar Agrawal, the same cannot be clubbed with the account of M/s. Singhal Casting Company. The second garnishee notice is in respect of M/s. Singhal Casting Company and the bank itself was in the position of its creditor.

Section 226 of the Act provides other modes of recovery of income tax dues and its sub section (3) provides one of such modes to recover the income tax dues. It is apt to reproduce sub section (3) of section 226 in its entirety:

(3) (i) The 1[Assessing] Officer 2[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 due³ to the assessee or any person who holds or may subsequently hold money⁴ for or on account of the assessee to pay to the 5 [Assessing] Officer 6[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 subsection 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 subsection, 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 subsection, every person to whom a notice is issued under this subsection 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 subsection 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 subsection 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 subsection 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 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 subsection 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 subsection, 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 subsection 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 subsection 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.

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 or on account of assessee to pay to the Assessing Officer or Tax Recovery Officer. Proceedings under Sub section (3) of section 226 of the Act are in 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 attachment becomes operative something which the law recognises as a debt. So long as there is a debt in existence, it is not necessary that it should be immediately payable. Where any existing debt is payable by future instalments, the garnishee order may be made to become operative as and when each instalment becomes due. The debt must be one which the judgment debtor could himself enforce for his own benefit. A debt is sum of money which is now payable or will become payable in future by reason of present obligation (See Hyderabad Cooperative Commercial Corporation Limited Vs. Sayeed Mohit Khadir, AIR 1975 SC 2254).

The crux appears to be that the person to whom garnishee order/notice is issued must be in the position of a creditor with respect to the assessee in default.

In *Income Tax Officer, Madras and another Vs. Buddha Pictures, Madras*, AIR 1967 SC 1547, a case under the old Income Tax Act, 1922, the Apex Court had occasion to consider similar provision as existed therein and said that a person to whom notice has been issued has only to object that the sum demanded or part thereof is not due to the assessee or that he does not hold any amount on account of the assessee. He has not to say that he is not likely to owe or to hold money. Interpreting the expressions "may become due" or "may subsequently hold money" suggests, in the context, a subsisting relationship between the person served with the notice and the assessee that is assessee's employer, or banker or debtor etc. etc..

Sub section (3) of section 226 of the Act is subdivided into ten clauses. It lays down the entire machinery with regard to the jurisdiction of the Assessing Officer/ Tax Recovery Officer to issue garnishee notice requiring any person for money is due or may become due to the assessee, under clause (i). Clause (iv) lays down that every person to whom such notice is issued shall be bound to comply with

the notice. Any claim respecting any property in relation to such a notice under this sub section shall be void as against the demand contained in the notice vide sub section (v). Under sub section (vii) it is provided that the person to whom such a notice has been issued may file objection on the ground 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. Such objection shall be filed on affidavit. If such an objection is filed but it is ultimately discovered that such statement was false in any material particular such person shall be personally liable to the Assessing Officer or the Tax Recovery Officer to the extent of his own liability to the assessee on the date of notice. The other clauses of section 226 (3) provides the manner to amend or revoke the notice so issued by the Assessing Officer or the Tax Recovery Officer. Sub section (ix) further provides that any person discharging any liability to the assessee after receipt of the notice under sub section (3) of section 226 of the Act shall be personally liable to the Assessing Officer or the Tax Recovery Officer to the extent of his own liability to the assessee so discharged. Sub section (x) provides that if the noticee fails to make the payment in pursuance of the notice he shall be deemed to be an assessee in default.

For the present purposes clause (vi) is important. The use of words "due to the assessee" is important. At the time of the garnishee notice, the sum must be due to the assessee. In this context the learned counsel for the petitioner submitted that on the date of second notice as also on the date of first notice, nothing was due from the bank to the assessee i.e. M/s. Singhal Casting Co. Ltd.. The bank had provided open cash credit limit and there was debit balance in the account of the assessee namely M/s. Casting Co. Limited. This was so stated in reply to the first notice (which has not been pursued any further and is not basis of the impugned order). The basis of the impugned order is the second notice dated 22.2.2006 in reply whereof, the petitioner submitted that nothing was due from the bank to M/s. Singhal Casting Co. Limited, a fact which has not been found to be incorrect even in the order impugned in the writ petition, thus, stands unchallenged.

As pointed out herein above, and keeping the very nature of the garnishee proceedings in the background of mind, as also the observation by the Apex Court in the case of Hyderabad Commercial Corporation (supra) as in the case of Budha Pictures (supra), we find sufficient force in the argument of the petitioner that on the date of garnishee notice, the bank was not in a position of a debtor of the assessee but was in the position of a creditor as the assessee had open cash credit limit and debit balance in its account.

In a very old case, K.M. Adam Vs. Income Tax Officer, (1958) 33 ITR 26, the Madras High Court has taken the similar view though under the Income Tax Act, 1922. There, the bank had afforded the overdraft facilities to its customers, a question arose whether the bank 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. 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 any point of time at which it holds any money of his on his account. Section 46(5A) of the Act cannot on any construction be intended as a creditfreeze, 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, section 46(5A) would come into play and the sum so standing to the credit of the assessee might be directed to be paid over....."

Clause (i) of Sub section (3) of section 226 of the Act applies in four set of circumstances:

- (1) when money is due from a person to the assessee;
- (2) when money may become due from a person to the assessee;
- (3) when any person holds money for the assessee; and
- (4) a person may subsequently hold money for or on account of assessee.

In all such eventualities, sine quanon is that the person who is required to pay the amount to the department on behalf of the assessee must hold or possess the money of the assessee for or on account of the assessee on a plain and simple language of clause (i) of Sub section (3) of section 226 of the Act. Any other interpretation would be against the very basic nature of the garnishee proceedings.

Having said so as above, we find that the order impugned in the writ petition is based on incorrect premise and is somewhat contradictory. It twisted the facts to lend support to the impugned order. The very important fact which has been twisted is as follows:

In paragraph7 of the impugned order, the Tax Recovery Officer has reproduced the notice issued under section 226(3) of the Act dated 22.2.2006. The said reproduction, we are sorry to say, is not correct reproduction of the said notice and it goes to the very root of the matter. A photostat copy of the said notice dated 22.2.2006 has been filed as Annexure4 to the writ petition, the correctness of which has not been disputed in the counter affidavit. It shows that in the said notice it is mentioned that "a sum of Rs.41,43,342/ + interest under section 220(2) is due from M/s. Singhal Casting Company (Prop. Mukesh Kumar Agrawal) of While in the impugned order the things have been reversed and it reads as follows:

"A sum of Rs.41,43,342/ + interest under section 220(2) "is due from Mukesh KumarAgrawal", Prop. "M/s. Singhal Casting Co."

The learned counsel for the petitioner submitted that this mistake is intentional. The department had realized its mistake that in the second notice which is dated 22.2.2006 the garnishee order was passed against M/s. Singhal Casting Company which had, admittedly, a separate bank account no. GA 15016 having drawing of Rs.65,70,527.71. It is not necessary for us to say anything further and we leave the matter as it is.

The Tax Recovery Officer while passing the impugned order appears to have been in confusion and was not sure as to whether the credit balance in the individual name of Sri Mukesh Kumar Agrawal could or could not be clubbed with the minus balance standing in the account of M/s. Singhal Casting Company. In para 11 (iii) he states that the Account No.SB 9319 was wrongly mixed with the cash credit account No. GA 15016 lying in the name of M/s. Singhal Casting Company. He goes on saying, legally correct, that the saving bank account is completely a distinct account and the money lying in this account is money of the account holder. So the money lying in the account number SB9319 was the money of Sri Mukesh Kumar which becometh the property of the Income Tax Department after service of notice under section 226(3) dated 22.2.2006 vide page no.141 of the paper book. On the subsequent page, he clubbed the account numbers SB 9319 and GA No.15016. The said paragraph is reproduced below:

(vi) "However, even if we club the account number SB 9319 and GA15016 and see the aggregate balance then there were two instances when aggregate balance was in credit:

First Instance

08.05.2006

Balance in Saving Bank Account SB 9319,
of Shri Mukesh Kumar Agarwal Credit Rs.20,04,727.44
(Annexure "A")

Balance in cash Credit account
GA 15016, of Proprietorship Firm
M/s. Singhal Casting Company Debit Rs. 11,20,889.77
(Annexure "B")

Aggregate Balance Credit Rs. 8,83,837.67

Second Instance

06.06.2006

Balance in Saving Bank Account SB 9319,
of Shri Mukesh Kumar Agarwal Credit Rs.10,02,415.44

(Annexure "A")

Balance in cash Credit account

GA 15016, of Proprietorship Firm

M/s. Singhal Casting Company Debit Rs. 9,93,113.77

(Annexure "B")

Aggregate Balance Credit Rs. 9301.67"

The above approach of the Tax Recovery Officer is faulty for the following reasons:

1. The garnishee notice dated 22.2.2006 was with respect to the assessee namely Singhal Casting Company.
2. The bank was, in fact, a creditor of the assessee namely M/s. Singhal Casting Company as it had advanced money under open cash credit limit.
3. The bank was maintaining the various accounts of Mukesh Kumar Agrawal under different capacities/distinct entities which could not be clubbed together.

Mukesh Kumar was having bank account of Mukesh Kumar Agrawal HUF, Account No. GA 17105 in the name of M/s. Shivangi Steels Private Limited. The Tax Recovery Officer himself has noticed that these accounts belong to the separate entities and could not be clubbed and as a matter of fact, has raised objection on the ground that "the bank wrongly mixed the account Nos. SB 11738 and SB 21608 which are in the name of Mukesh Kumar Agrawal HUF and Account No. GA 17105 which is lying in the name of M/s. Shivangi Steels Private Limited. After saying so, he in the above quoted paragraph pointed out two instances by clubbing the saving bank account of Mukesh Kumar Agrawal with that of M/s. Singhal Casting Company, which under law according to the petitioner, could not have been done. We find sufficient force in the argument of the petitioner's counsel that the bank was maintaining multiple accounts of different natures and all these accounts belong to the respective entities. The garnishee notice dated 22.2.2006 being in the name of M/s. Singhal Casting Company, the bank was not supposed to attach the saving bank account of Mukesh Kumar Agrawal in pursuance of the said garnishee notice, even if Mukesh Kumar Agarwal happens to be proprietor of M/s. Singhal Casting Company, specially, when the first garnishee notice dated 5th of September, 2005 was in the name of Mukesh Kumar Agrawal, was not pursued any further by the department. No show cause notice was issued nor further action was taken in pursuance of the first notice after passing of the judgment by this Court in Civil Misc. Writ Petition No.1356 of 2005 dated 7th October, 2005. The conduct of the department shows that the department left out the first garnishee notice and proceeded to recover the amount due from M/s. Singhal Casting Company by issuing the second garnishee notice dated 22.2.2006 which is the basis of the impugned order.

The upshot of the above discussion is that the garnishee notice dated 22.2.2006 in respect of which the petitioner has been held deemed assessee in default being in respect of assessee M/s. Singhal Casting Company who was having debit balance with the petitioner's bank, the petitioner cannot be held as deemed assessee in default in view of the fact that the bank was not debtor of the said assessee on the date of garnishee notice. The position of the bank qua the assessee M/s. Singhal Casting Company was that of creditor of the assessee. The assessee company was indisputably enjoying the open cash credit limit and had debit balance at the relevant point of time. The saving bank account no.9313 which had even if a credit balance on 8th of May, 2006 or 6th June, 2006 belongs to Mukesh Kumar Agrawal, a separate entity, who was not assessee in default, could not be clubbed with the bank account of M/s. Singhal Casting Company.

From the above discussion, it is clear that the assessee with respect to whom garnishee notice has been served on a person, here the bank, the person to whom the notice has been served (here the bank) could say only this much that no money is due from it (bank) to the assessee. To put it differently, it is crystal clear that the noticee must be in the position of a creditor of the assessee with respect to whom the garnishee notice has been served, which as found is not so here.

POINT NO.3

The third submission of the learned counsel for the petitioner that in any case, the petitioner can not be held personally deemed assessee in default in view of the fact that the garnishee notice was addressed to the Branch Manager, Canara Bank. Clause (vi) of section 226(3) of the Act provides where a person to whom garnishee notice is sent, objects that the sum demanded or any part thereof is not due to the assessee etc. shall not be required to pay the amount to, if it is discovered that such statement was false in any material particular such person shall be personally liable. To hold such person personally liable it is to be found that the objection raised by the person was false in any material particular.

According to Black's Law Dictionary (6th Edition), the word "false" has two distinct and well recognised meanings:

(1) intentionally or knowingly or negligently untrue; (2) untrue by mistake or accident, or honestly after the exercise of reasonable care. A thing is called "false" when it is done or made, with knowledge, actual or constructive, that is untrue or illegal, or it is said to be done falsely when the meaning is that the party is in fault of its error.

P. Ramnatha Aiyar in Advanced Law Lexicon (3rd Edition, 2003) explains the word "false" as:

"In the more appropriate uses in jurisprudence the word implies something more than a mere untruth; it is untruth coupled with a lying intentor an intent to deceive or to perpetuate some treachery or fraud. The true meaning of the

term must, as in other instances, often be determined by the context.

The burden of showing that the statement on oath is false in any material particular would be on revenue, as held by the Apex Court in Behari Lal Ram Charan Vs. I.T.O., (1981) 131 ITR 129. Revenue would be bound to disclose to garnishee all such material or evidence on which it proposes to rely. It would have to be shown by the revenue on the basis of relevant evidence or material that the statement on oath is false in any material particular and that a certain definite amount is due from the garnishee to the assessee. It is only then that personal liability for payment can be imposed on the garnishee under section 226(3)(vi) of the Act.

Here the words "false in any material particular" are important. The word "false" is stronger word than the word "wrong". Somekind of intention of making a wrong statement is essential to construe a statement as false. Here, the petitioner being in a position of Manager of the Bank took the precautionary steps to communicate the garnishee notice to its Head Office and sought guidance therefrom. The petitioner contends that all the material time he acted as per guidance provided by the Head Office from time to time. Being a bank employee, the petitioner was required to follow the instructions of its Head Office. Coupled with this fact, the bank account of the assessee M/s. Singhal Casting Company was in red. The stand of the bank that it has general lien on the saving bank account of Mukesh Kumar Agrawal as per banking practice, cannot be said to be totally untrue.

Section 171 of the Contract Act deals with the general lien of Bankers etc.. It does not expressly refer to Banker's lien in respect of cash deposits. But it has been held to be a species of goods over which lien may be exercised. Lien may arise from contract or from mercantile usage or by operation of law.

In Punjab National Bank Ltd. versus Arura Mal, AIR 1960 PB 632, it has been held that the rule of English Law that Bank has a lien or more appropriately a right to set off against all moneys of customers in its hand has been accepted in India.

In order to create Banker's lien on several accounts it is necessary that they must belong to the payer in one and in the same capacity. Where the person has two accounts, one a trustee account and another private account at a Bank, deposits in the two accounts cannot be set off, the one against the other (see AIR 1934 Rang 66).

Bankers have a right to combine one or more accounts of the same customer. But it cannot combine the account belonging to another or to himself alone with another account which is the joint account with another and third person, vide Radha Raman v. Chota Nagpur Banking Association Ltd., AIR 1944 Pat. 368 and Punjab National Bank Ltd. v. Satyapal Virmani, AIR 1956 Punj 118.

Similarly, the Banks have no lien, on the deposit of a partner, on his separate

account, for a balance due to the Bank from the firm. Therefore the banker is entitled to combine all accounts kept in the same right by the customer. It does not matter whether the accounts are current or deposit or whether they are in the same or different branches (*Garnett v. Mckewan* (1872), 8 Ex. 10). It is of essence to the validity of a banker's lien, that there should be a mutually of claim between the Bank and the depositor. In order that it should be permissible to set off one demand against another both must mutually exist between the same parties.

Since the very inception, plea of Banker's lien was set up as a defence by the petitioner. The said plea has not been meted out by the respondent no.2, properly. Such a vital issue, touching the jurisdictional fact, has been disposed off with the remark that no lien was recorded with respect to saving bank account of Mukesh Kumar. The plea should have been considered in the light of the loan agreement and other related documents. The department has failed to discharge its burden that plea in defence is false.

The rule of English law that the Bank has a lien or more appropriately, a right to set off against all monies of his customers in his hands has been accepted as the rule in India. According to this rule when monies are held by the Bank in one account and the depositor owes the Bank on another account, the Banker by virtue of his lien has a charge on all monies of the depositor in his hands and is at liberty to transfer the monies to whatever account, the banker may like with a view to set off or liquidate the debts: vide *Llyods Bank Ltd. v. Administrator General of Burma*, AIR 1934 Rang 66 and *Devendrakumar Lalchandji v. Gulabsingh*, AIR 1946 Nag. 114.

SUBSEQUENT DEVELOPMENTS AFTER THE IMPUGNED ORDER.

From the pleadings of the parties, as they stand, it is clear that the income tax dues against the assessee either has been reduced, modified or still pending final adjudication. In para 39 of the writ petition it has been stated that M/s. Singhal Casting Company has moved an application for settlement of the case under section 243 C (1) of the Income Tax Act in the Settlement Commission on 28.5.2007 and has deposited a sum of Rs.8,70,000/. The contents of the said paragraphs have not been denied and only this much in reply has been stated, that it is a matter of record, by the respondents. The another aspect of the matter is that in pursuance of the order dated 28.2.2007 passed by the Income Tax Appellate Tribunal in respect of block period 1st April, 1989 to 16th February, 2000 the matter has been restored back to the file of CIT (A) to decide the appeal afresh on merits. The said appeal is said to be pending when the petition was filed and was still pending when the counter affidavit was filed by the respondents. We have noted these facts with a view to show that the assessment proceeding does not appear to have been concluded. In this factual matrix, it would not be appropriate to hold the petitioner deemed assessee in default to make him personally liable to pay a sum of Rs.36,11,720/ which includes Rs.7,52,329/ towards the interest when the matter relating to determination of

tax liability of M/s. Singhal Casting Company is subjudice before the Settlement Commission and/or CIT (A) as admitted by the parties. After all, the department is interested to recover the money due to it as per law and not otherwise. Section 226, as its heading suggests is one of the modes for recovery of outstanding tax dues which in the case on hand has not yet crystallized to a definite figure or attained the finality so far.

Viewed as above, we find sufficient force in the petition and the grounds raised therein.

In the result, the writ petition succeeds and is allowed and the impugned order dated 26.6.2007 passed by the respondent no.2 is quashed with cost of Rs.10,000/ payable by the respondent no.2 to the petitioner.