

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE C.K.ABDUL REHIM &

THE HONOURABLE MR.JUSTICE T.V.ANILKUMAR

MONDAY, THE 20TH DAY OF JANUARY 2020 /30TH POUSHA, 1941

WA.No.2488 OF 2019

AGAINST THE JUDGMENT IN WP(C) 32723/2019(M) OF THIS COURT

APPELLANT/PETITIONER:

ANDOORKONAM SERVICE CO-OPERATIVE BANK
LTD.NO.3127,
REPRESENTED BY ITS SECRETARY-IN-CHARGE,
KEEZHAVOOR P O, THIRUVANANTHAPURAM DISTRICT-
695584.

BY ADVS.
SRI.T.R.HARIKUMAR
SRI.ADITHYA RAJEEV

RESPONDENTS/RESPONDENTS:

- 1 THE INCOME TAX OFFICER,
WARD - 2(1), OFFICE OF THE ADDITIONAL
COMMISSIONER OF INCOME TAX, AAYAKAR BHAVAN,
KAWDIAR P O, THIRUVANANTHAPURAM,PIN-695003.
- 2 THE COMMISSIONER OF INCOME TAX (APPEALS)
AAYAKAR BHAVAN, KAWDIAR P O,
THIRUVANANTHAPURAM,PIN-695003.

3 THE REGISTRAR,
INCOME TAX APPELLATE TRIBUNAL, COCHIN BENCH,
KENDRIYA BHAVAN, BLOCK NO.C1 AND C2, 1ST FLOOR,
KAKKANAD, KOCHIN-PIN-682030.

4 THE NEDUMANGAD CO-OPERATIVE URBAN BANK LTD
NO.3193,
REPRESENTED BY ITS SECRETARY, VEMBAYAM,
THIRUVANATHAPURAM DISTRICT-PIN-695615.

R1 BY SRI.CHRISTOPHER ABRAHAM, INCOME TAX
DEPARTMENT

THIS WRIT APPEAL HAVING COME UP FOR ADMISSION ON
20.01.2020, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

[C.R.]

**C.K. ABDUL REHIM
&
T.V. ANILKUMAR, JJ.**

Writ Appeal No. 2488 OF 2019

Dated this the 20th day of January, 2020

J U D G M E N T

The writ petitioner - Andoorkonam Service Co-operative Bank Ltd. is the appellant herein, challenging judgment of the Single Judge, dated 03.12.2019. The respondents are the respondents in the writ petition.

2. Ext.P7 notice of attachment and recovery for realization of amounts due from the appellant Bank, issued to the 4th respondent Bank as garnishee, was under challenge in the writ petition. *Inter alia*, the petitioner Bank sought direction for refund of the amount paid by the 4th respondent to the

Income Tax Department pursuant to Ext.P7. Contention of the petitioner was mainly that, the assessment made with respect to the amount sought to be recovered through Ext.P7 was under challenge in an appeal and that the recovery steps from the garnishee was initiated without taking into consideration of pendency of the appeal and the stay petition. Further contention raised is that, the 'garnishee proceedings' was initiated and the amount was recovered without issuing any notice to the appellant, as required under Section 226(3) of the Income Tax Act. It is contended that, the learned Single Judge, without adverting to the claim for refund, had disposed of the writ petition by directing the 3rd respondent to consider and to pass orders on Ext.P4 appeal, within three months. It is aggrieved by the said judgment, the above writ appeal is filed.

3. Learned counsel for the appellant contended that the recovery of the amount was effected on the same day on which Ext.P7 notice was issued to the 4th respondent-Bank. It is after

effecting such recovery that a copy of the notice was served on the appellant. It is pleaded that the notice to the assessee is a mandate under due process of law, under Section 226(3) of the Income Tax Act. Therefore the attachment and recovery of the amount is effected without compliance of such mandate.

4. Learned counsel had drawn our attention to a judgment of a learned Single Judge of this court in **Suntec Business Solutions(P) Ltd. v. Union of India and others (2014 KHC 374)**. It was observed therein that, the power conferred under Section 226(3) has to be exercised with greatest caution and the provision has to be construed strictly. The power to attach and recover amounts from a third party has to be invoked sparingly, only in the event of the assessee having deliberately evaded recovery and indulging in activities which would eventually defeat the recovery. Even if the attachment is effected in the bank account, the recovery officer ought to have called for details of the amounts lying in credit of

the assessee and if sufficient amounts are available in the account, attachment could have been continued, without recovery, especially when the assessee had informed that the assessment is being challenged in appeal. The recovery proceedings effected by way of garnishee proceedings under Section 226 has to be notified to the assessee also, as provided under Section 226(3)(iii). It was found that mandate of the provision insists that a copy of the notice issued to the garnishee should be forwarded to the assessee, by relying on a decision of the Calcutta High Court in **Purnima Das v. Union of India(2010 (329) ITR 278 (Cal)**, wherein it was found that it was not proper on the part of the Assessing Officer to attach and debit a sum, without serving a copy of the notice of attachment on the assessee as mandated in the provision.

5. In the case at hand, the respondents 1 to 3 had filed statement categorically mentioning that the demand became due on 23.11.2019. Ext.P7 notice was issued to the 4th

respondent on 25.11.2019 and an amount of ₹23,67,037/- was collected from the 4th respondent bank on that day itself. It is specifically stated that a copy of the notice under Section 226(3) was forwarded to the appellant on 26.11.2019 itself, as required under Section 226(3)(iii). Subsequently another letter was issued to the assessee on 29.11.2019 informing him about the collection made and about adjustment of the amount recovered against the demand raised.

6. Even though the provisions under Section 226(3) insist only for forwarding a copy of the notice to the assessee, the circumstances of each case has to be considered. Here is a case where the recovery was effected on the same day when the notice was issued to the garnishee, that too within 2 days of the amount became due. Mere forwarding of a copy of the notice, after effecting recovery, will not in any way serve the object underlying the legislative intent in introducing subsection(iii) of Section 226(3). This is especially because the

respondents 1 to 3 ought to have considered the pendency of the appeal.

7. In the decision of this court in **Rajan Nair v. ITO (1987 (1) KLT 475)** it is held that, in exercising the powers of stay, the Income Tax Officer should not act as a mere tax gatherer, but as a quasi-judicial authority vested with the public duty of protecting interests of the Revenue and to mitigate the hardship to the assessee. A Division Bench of the High Court of Bombay, following the above said observations, had laid guidelines to the effect that, no recovery of tax should be made pending expiry of the time limit for filing an appeal. The said dictum was seen followed by a learned Judge of this court in the decision in **Mother India Educational and Cultural Charitable Trust, Tvm v. Deputy Commissioner of Income Tax, Tvm and others(2014 KHC 353)**.

8. Considering the factual scenario involved in the case at hand, we have no hesitation to hold that the attachment and

recovery was effected at a great haste, without taking into consideration of the parameters enshrined in all the decisions cited as above. Further, we take note of the fact that the issue pertaining to liability of the appellant bank for payment of income tax, remains now settled through the decision of a Full Bench of this court in **Mavilayi Service Co-operative Bank v, Commissioner of Income Tax [2019 (2) KLT 597(FB)]**. It is held therein that, by the reason of sub-section (4) of Section 80P of the Income Tax Act, the Assessing Officer has to conduct an enquiry into the factual situations with respect to the activities of the society, in order to satisfy himself to the conclusions arrived at and also as to whether the benefits under Section 80 can be extended or not.

9. According to the learned counsel for the appellant, such a verification has not been done in the case. But the learned Standing Counsel appearing for the respondents 1 to 3 had pointed out that, even in the original assessment itself,

those aspects were considered by the appellate authority. However, as observed above, recovery from the 4th respondent garnishee bank has been done in a manner depriving the interest of the assessee and without following the guidelines which ought to have been followed in the matter of garnishee attachment and recovery. However, since the amount has already been collected against the existing demand, we are not inclined to direct release of the amount, unless the appellant society furnishes Bank Guarantee for the entire amount. We take note of the fact that the above aspects were not considered by the learned Single Judge while disposing of the writ petition. Hence the impugned judgment requires modification.

10. Therefore, the above writ appeal is hereby disposed of by directing the respondents 1 to 3 to make refund of the amount to the appellant society, in case the appellant society furnishes Bank Guarantee to the tune of the entire amount

recovered, to the satisfaction of the first respondent. The Bank Guarantee is directed to be kept in tact, until disposal of the appeal filed by the appellant before the 2nd respondent. Needless to observe that, realization of the Bank Guarantee shall be made only after communicating the appellate order to the appellant society. The refund shall be effected within a period of 2 weeks from the date of furnishing of the Bank Guarantee. The direction issued by the learned Single Judge in the impugned judgment with respect to disposal of the appeal shall survive.

Sd/-

C.K.ABDUL REHIM

JUDGE

Sd/-

T.V.ANILKUMAR

JUDGE

ul/-