



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

WRIT PETITION (L) NO.2633 OF 2024

Chokshi Arvind Jewellers
Through its Partner,
Mr. Kapil A Parekh, aged 56 years,
105, 107, Zaveri Bazar, Shaikh Memom
Street, Mumbai, Maharashtra- 400 002

... Petitioner

Versus

1. Union of India
through the Secretary, Ministry of Finance,
Department of Revenue,
North Block, New Delhi- 110 001
2. Deputy Commissioner of Customs
HQIU, R&I, 11th Floor, New Custom
House, Mumbai-400 001
3. Office of the Commissioner of
Customs (Preventive), Jodhpur
HQRS. AT N.C.R. Building, Statute Circle,
C-Scheme, Jaipur-302005
4. Kotak Mahindra Bank
Bhagat Tarachand House,
154/156, Kalbadevi Road,
Cotton Exchange Kalbadevi
Mumbai-400 002
Maharashtra
5. Bank of Baroda
Zaveri Bazar Branch,
122, Sheikh Memon Street,
Trishala Building,
Mumbai-400 002.

... Respondents

WITH
WRIT PETITION (L) NO.2634 OF 2024

Pallav Gold

Through its Sole Proprietor

Mr. Pallav Ladulal Kanther, aged 26 years,
801, DD Jewel Building Premises Co-op
Society, DD Jewel Building, Bldg No.28,
1st Agyri Lane, Zaveri Bazar, Mumbai-27

... Petitioner

Versus

1. Union of India
through the Secretary, Ministry of Finance,
Department of Revenue,
North Block, New Delhi- 110 001
2. Deputy Commissioner of Customs
HQIU, R&I, 11th Floor, New Custom
House, Mumbai-400 001
3. Commissioner of Customs (Preventive),
Jodhpur HQRS. At N.C.R Building,
Statute Circle, C-Scheme, Jaipur – 302005
4. Senior Intelligence Officer,
Office of the Commissioner of
Customs (Preventive), Jodhpur
HQRS. AT N.C.R Building, Statute Circle,
C-Scheme, Jaipur-302005
5. Kotak Mahindra Bank
382, 384, Narasinatha Stree,
Katha Bazar Mandvi West,
Mumbai, Maharashtra 400009
6. ICICI Bank Ltd
226/230, Giriraj, Opp. TBZ,
Zaveri Bazar,
Mumbai-400 002

... Respondents

**WITH
WRIT PETITION (L) NO.2635 OF 2024**

Maxis Bullion

Through its Partner

Mr. Pallav Ladulal Kanther, aged 26 years,

... Petitioner

801, DD Jewel Building Premises Co-op
Society, DD jewel Building, Bldg No.28,
1st Agyri Lane, Zaveri Bazar, Mumbai-27

Versus

1. Union of India
through the Secretary, Ministry of Finance,
Department of Revenue,
North Block, New Delhi- 110 001
2. Deputy Commissioner of Customs
HQIU, R&I, 11th Floor, New Custom
House, Mumbai-400 001
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Jodhpur HQRS. At N.C.R Building,
Statute Circle, C-Scheme, Jaipur – 302005
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Office of the Commissioner of
Customs (Preventive), Jodhpur
HQRS. AT N.C.R Building, Statute Circle,
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5. Kotak Mahindra Bank
382, 384, Narasinatha Stree,
Katha Bazar Mandvi West,
Mumbai, Maharashtra 400009
6. ICICI Bank Ltd
226/230, Giriraj, Opp. TBZ,
Zaveri Bazar,
Mumbai-400 002
7. Yes Bank Ltd.
Ground and First Floor,
396/410, Shamita Terrace,
Lamington Road,
Mumbai-400 004. ...Respondents

Dr.Sujay Kantawalla, Mr.Anupam Dighe, Ms.Changni Tanna,
Mr.Prathamesh Chavan, Mr.Ankit Trivedi i/b M/s.India Law Alliance for
the Petitioners

Mr.Jitendra Mishra a/w Ms.Sangeeta Yadav, Mr.Umesh Gupta for the

investigation, the officers of Respondent Nos.2 and 3 also indicated that they were also investigating Gyanesh Jewel Gold and Swastik Impex.

7. The Petitioner was further informed that the Petitioner had dealings with the said entities in the past and that a series of sales of Gold Bullion were made by the said entities to the Petitioner in the course and furtherance of business under a GST paid invoice.

8. Thereafter, various summons came to be issued to the Petitioner by Respondent No.3. In adherence to the summons, the partner of the Petitioner, Kapil Parekh, visited the office of Respondent No.3 on 18th August 2023 and 9th January 2024. Further, as indicated in the summons, all the requisite documents were submitted to Respondent No.3 by emails dated 1st April 2023, 18th August 2023 and 9th January 2024.

9. Thereafter, the Petitioner was informed by a letter dated 15th January 2024 addressed to it by Respondent No.4 – Kotak Mahindra Bank, that Respondent No.3, through its notice, had instructed Respondent No.4 to change the account operation status to “Debit Freeze”, thus, provisionally attaching the Petitioner’s bank account with Respondent No.4.

10. Further, the Petitioner was also informed by Respondent No.5 -Bank of Baroda, by a letter dated 16th January 2024, that Respondent No.3, through its notice, had instructed Respondent No.5 to provisionally attach the bank account of the Petitioner under Section 110(5) of the Customs Act, 1962 (“the Act”).

11. Challenging this attachment, the Petitioner has filed the present Petition seeking the following final reliefs:

“a. That this Hon'ble Court be pleased to hold and declare:

i. that freezing of the Petitioner's Current Account No. 5112113709 held with Respondent No. 4 bank is bad in law;

ii. that freezing of the Petitioner's Current Account No.04230200000795 held with Respondent No. 5 bank is bad in law;

b. That this Hon'ble Court be pleased to issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction directing Respondents, their servants, subordinates and agents:

i. To unfreeze the Petitioner's Current Account No.5112113709 held with Respondent No. 4 Bank.

ii. To unfreeze the Petitioner's Current No. 04230200000795 held with Respondent No. 5 Bank.”

Facts in Writ Petition (L) No.2634 of 2024

12. The Petitioner, Pallav Gold, is a sole proprietorship of one Pallav Ladulal Kanther, who is also a working partner in the partnership firm Maxis Bullion. On 28th April 2022, a search operation in the name of the firm Maxis Bullion was conducted at the Petitioner's office premises, which is the same as the premises of Maxis Bullion. Further, a search operation was also conducted at the residential address of the sole proprietor of the Petitioner at A 301, Flat No.53, Mangal Tower, Sector No.17, Vashi, Navi Mumbai, Maharashtra. A Panchnama dated 28th April 2022 was prepared pursuant to the search operation by the Respondents in the name of Maxis Bullion and also certain documents were seized.

13. At the time of the search, the Petitioner's Proprietor was present at the office premises and was informed that the said operation was being conducted due to purported intelligence received by the Respondent Authorities, that Maxis Bullion had entered into a domestic purchase transaction with an importer, namely Shubhang Enterprises, who had illegally smuggled Gold Bullion into India.

14. Thereafter, the Petitioner was informed by Respondent No.5 – Kotak Mahindra Bank, by email dated 23rd January 2024, that the Bank account of the Petitioner was frozen in view of a notice dated 11th January 2024 received from the Ministry of Finance of Jaipur. Further, the Petitioner was also informed by Respondent No.6 – ICICI Bank, by email dated 30th January 2024, that the status of the bank accounts of the Petitioner in the said Bank was changed from ‘No Freeze’ to ‘Debit Freeze’. Further, Respondent No.6 informed the Petitioner that the account had been frozen due to a notice dated 11th January 2024 received from the Ministry of Finance, Department of Revenue.

15. In these circumstances, the Petitioner has approached this Court, by way of this Writ Petition under Article 226 of the Constitution of India, seeking the following final reliefs:

“a. That this Hon'ble Court be pleased to hold and declare that freezing of the Petitioner's Current Account No. 9820161097 held with Respondent No. 5 bank, is bad in law;

(a-1). That this Hon'ble Court be pleased to hold and declare that freezing of the Petitioner's Current Account No. 026105009537 and Saving Account No.026101005087 with Respondent No.6 Bank are bad in law;

b. That this Hon'ble Court be pleased to issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction directing Respondents, their servants, subordinates and agents to unfreeze the Petitioner's bank account i.e., Current Account No.9820161097 held with Respondent No. 5 bank;

(b-1). That this Hon'ble Court be pleased to issue a Writ of mandamus or Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction directing Respondents, their servants, subordinates and agents to unfreeze the Petitioner's Bank Account i.e. Current Account No. 026105009537 and Saving Account No. 026101005087 held with Respondent No. 6 Bank.”

Facts in Writ Petition (L) No.2635 of 2024

16. The Petitioner is a Partnership Firm engaged in the business of Gold Bullion trading for a period of over four years. In the course of its business, the Petitioner entered into an agreement with one Shubhang Enterprises, through one broker, for purchase of two kgs of Gold Bullion. As per its routine practice in business, the Petitioner purchased the said two kgs of Gold Bullion from Shubhang Enterprises. GST – Paid Invoice dated 1st August 2020 came to be issued by Shubhang Enterprises in favour of the Petitioner. In further course of business, the said two kgs of Gold Bullion came to be sold by the Petitioner into the local market. The Petitioner made payments to Shubhang Enterprises against the said invoices via banking channel i.e. RTGS / NEFT.

17. Thereafter, based on certain intelligence, a search operation came to be conducted on 28th April 2022, by the officers of Respondent Nos.2 and 4, at the office premises of the Petitioner and also at the residential address of the partner of the Petitioner, Pallav Ladulal Kanther, located at A 301, Flat No.53, Mangal Tower, Sector No.17, Vashi, Navi Mumbai, Maharashtra. A Panchnama dated 28th April 2022 was prepared by the Superintendent of Customs (P), R & I, Mumbai Customs, pursuant to the said search operation. During the said search operation, certain documents were also seized and taken into custody by the Customs Authorities. A Panchnama in pursuance of the said search operation conducted at the residential premises of Pallav Ladulal Kanther was not provided. It is the case of the Petitioner that no incriminating evidence was found at any of the aforesaid premises.

18. At the time of the search, the Petitioner's partner who was present at the office premises was informed that the said operation was being conducted due to intelligence received by Respondent No.3 that the original importer

“Shubhang” had illegally smuggled gold bullion into India and that the premises were being searched as the Petitioner had dealt with Shubhang in the past.

19. Thereafter, summons came to be issued to the Petitioner and its authorised representative from time to time by Respondent No.4. In adherence to the summons, the representative of the Petitioner, Ladulal Kanther, visited the office of the Respondent No.4 on 24th August 2023 and 10th January 2024. Further, it is the case of the Petitioner that, as indicated in the summons, all requisite documents were submitted to Respondent No.4 by email dated 11th January 2024.

20. On 10th January 2024, at the time of attendance by the Petitioner’s authorised representative pursuant to the summons, it was informed by the officers of Respondent No.4 that the Petitioner had dealings with Centcore Multitrading Private Limited, SL Creation and Swastik Impex, in the past and that a series of supplies of gold bullion were made by the said entities to the Petitioner in the course of business. It was further informed that as the name of the Petitioner and the said entities had appeared in the data base of Shubhang, investigation had been initiated against the Petitioner. It is the Petitioner’s case that it had purchased the gold bullion from the said entities under a GST-paid invoice and payment for the same was made through banking channels.

21. Further, by a summons dated 11th January 2024, the Petitioner was once again asked to appear before Respondent No.4 on 23rd January 2024.

22. Thereafter, the Petitioner was informed by Respondent No.5 – Kotak Mahindra Bank, by an email dated 15th January 2024, that the status of its bank account was changed from ‘No freeze’ to “debit freeze”. Further, by another email dated 16th January 2024, Respondent No.5 informed the

Petitioner that its account had been frozen due to notice dated 11th January 2024 received from Ministry of Finance in Jaipur. It is the Petitioner's case that, on making oral enquiries with the bank, the Petitioner was informed that the account had been frozen pursuant to customs investigation against the Petitioner.

23. Thereafter, the Petitioner was informed by Respondent No.6 – ICICI Bank Ltd and Respondent No.7 – Yes Bank vide emails dated 30th January 2024 and 1st February 2024 respectively, that the status of the Petitioner's bank accounts in the said banks was changed from 'No Freeze' to 'Debit Freeze'. Further, on the basis of the notices dated 11th January 2024 received by Respondent No.6 and Respondent No.7 respectively, they informed the Petitioner that its account had been frozen under the instructions received from the Ministry of Finance, Department of Revenue.

24. It is in these circumstances, that the Petitioner has filed the present Petition, under Article 226 of the Constitution of India, seeking the following final reliefs:

"a. That this Hon'ble Court be pleased to hold and declare that freezing of the Petitioner's Current Account No. 8209963019 held with Respondent No. 5, pursuant to the direction of the Respondent authorities is bad in law;

a-1) That this Hon'ble Court be pleased to hold and declare that freezing of the Petitioner's Current Account No. 026105009854 held with Respondent No. 6 Bank and Current Account No.018963700001635 held with Respondent No. 7 Bank, pursuant to the direction of the Respondent authorities are bad in law;

b. That this Hon'ble Court be pleased to issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction directing Respondents, their servants, subordinates and agents to unfreeze the Petitioner's bank accounts i.e., Current Account No. 8209963019 held with Respondent No. 5 bank;

b-1) That this Hon'ble Court be pleased to issue a Writ of Mandamus or Writ in the nature of Mandamus or any other appropriate Writ, Order or Direction directing Respondents, their servants, subordinates and agents to unfreeze the Petitioner's Bank Account i.e. Current

Account No. 026105009854 held with Respondent No. 6 Bank and Current Account No.018963700001635 held with Respondent No.7 Bank.”

Submissions on behalf of the Petitioners

25. The Petitioners have sought directions for lifting the provisional attachment on the Petitioners’ bank accounts. In support of the same, Mr.Kantawalla, the learned counsel for the Petitioners, submitted that the said provisional attachment was bad in law, as, till date, no order attaching the Petitioners’ bank accounts had been passed by Respondent No.3. In support of his submission that the said order was necessary, Mr.Kantawalla relied upon the judgment of this Court in the case of *Boxster Impex Pvt.Ltd. vs. Union of India*¹.

26. Further, Mr.Kantawalla submitted that Section 110(5) of the Act, which gives the power of provisional attachment, clearly deals with a situation where an opinion has to be formed on the basis of material on record. Further, he submitted that the use of the word “may” in Section 110(5) of the Act indicated not only the discretion, but an obligation to consider that there is a necessity to pass an order with reasons to be recorded in writing for provisionally attaching the bank account in order to protect the interests of the Government Revenue. He submitted that, in the present case, the Petitioners’ bank account have been illegally sealed and frozen without following the procedure provided by Section 110(5) of the Act. In support of this submission, Mr.Kantawalla relied upon the judgement of the Supreme Court in the case of *Radha Krishan Industries vs. State of Himachal Pradesh & Ors.*² Relying on this judgement, Mr.Kantawalla submitted that, in the said Judgment, it was held that the power to order a provisional attachment of the property of a taxable person, including a bank account, is draconian in nature,

1 2021(44) G.S.T.L. 138 (Bom)

2 2021(4) TMI 837 – Supreme Court

and the conditions which are prescribed by the statute for a valid exercise of that power must be strictly fulfilled. He further submitted that the exercise of the power for ordering a provisional attachment must be preceded by the formation of an opinion by the Commissioner that it is necessary so to do for the purpose of protecting the interest of the government revenue. He submitted that in the judgment *Radha Krishan Industries* (Supra), the Supreme Court had further observed that, before ordering provisional attachment, the Commissioner must form an opinion on the basis of tangible material that the assessee is likely to defeat the demand, if any, and that therefore it is necessary to order provisional attachment for the purpose of protecting the interest of the government revenue.

Submissions on behalf of the Respondents

27. Mr.Mishra, the learned counsel for the Respondents, relied on the Affidavit in Reply filed on behalf of Respondent No.3. Mr.Mishra first submitted that the letters directing provisional attachment of the bank accounts, under the provisions of Section 110(5) of the Act, had been issued by the Deputy Commissioner of Customs (Preventive), Jaipur with due approval of the Competent Authority i.e. the Commissioner of Customs (Preventive) Jodhpur (HQ – Jaipur. He submitted that, since the said letter was issued by authorities in Jaipur and Jodhpur in Rajasthan, this Court had no territorial jurisdiction to entertain the present Petition and, therefore, the present Petitions were liable to be dismissed on the ground of jurisdiction alone.

28. Further, Mr.Mishra, submitted that, as per the provisions of Section 110(5) of the Act, there is no provision / requirement for informing or serving any notice to the account holder.

29. He further submitted that the Commissioner of Customs had formed reason to believe and to protect the interest of revenue directed to provisionally attach the bank accounts of the Petitioners. The said reason to believe was formed on the basis of tangible material available on record based on the investigation conducted so far. He submitted that, for these reasons, the judgment relied upon by Mr.Kantawalla did not apply to the facts and circumstances of the present case.

30. Mr.Mishra further submitted that, as per the provisions of Section 110(5) of the Act, no written order for provisional attachment of bank account is required to be passed and the letter issued to the bank for provisional attachment is deemed to be an order which was issued with the approval of the Principal Commissioner of Customs or Commissioner of Customs.

31. Mr.Mishra, further submitted that the Commissioner of Customs (Preventive) Jodhpur, Hqrs at Jaipur, had sufficient reason to believe on the basis of material facts of the active involvement of the Petitioners in the purchase of smuggled gold and, in the interest of revenue, approved the provisional attachment of the bank accounts of the Petitioners following the provisions prescribed under section 110(5) of the Act.

32. Mr.Mishra further submitted that the investigation was being carried out as per the provisions of the Act and, from the said investigation, it seems that the Petitioners were involved in purchasing of smuggled gold. Therefore, in the interest of Revenue, the bank accounts of the Petitioners were provisionally attached under Section 110(5) of the Act.

33. Mr.Mishra submitted that, for all these reasons, these Writ Petitions ought to be dismissed.

Analysis And Conclusion

34. We have heard the learned counsel for the parties and with their assistance, we have perused the documents on record.

35. Before dealing with the rival contentions of the parties, as the action as impugned is under Section 110(5) of the Act, it would be appropriate to set out the said which reads as under:

“(5) Where the proper officer, during any proceedings under the Act, is of the opinion that for the purposes of protecting the interest of revenue or preventing smuggling, it is necessary so to do, he may, with the approval of the Principal Commissioner of Customs or Commissioner of Customs, by order in writing, provisionally attach any bank account for a period not exceeding six months:

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform such extension of time to the person whose bank account is provisionally attached, before the expiry of the period so specified.”

36. On a bare perusal of the provisions of Section 110(5) of the Act, it can be seen that a bank account can be provisionally attached if the proper officer forms an opinion that, for the purpose of protecting the interest of revenue or preventing smuggling, it is necessary so to do. Further, an order directing provisional attachment of the bank account has to be in writing. It is thus, clear that the proper officer has to form to an opinion that it is necessary to provisionally attach the bank accounts for the purpose of protecting the interest of revenue or preventing smuggling. The key word in the sub section is “necessary”. The proper officer must form an opinion that it is necessary to provisionally attach the bank account for the aforesaid reasons and not only expedient to do so. Moreover, the necessity has to be for the purpose of protecting the interest of revenue or preventing smuggling and not for any other purpose.

37. Further, this opinion has to be formed based on tangible material available with the proper officer.

38. Further, the order in writing directing provisional attachment of the bank accounts must reflect as to why the proper officer is of the opinion that it is necessary to provisionally attach the bank account for the purpose of protecting the interest of revenue or preventing smuggling. These reasons must be set out in the order in writing. Further, the said order in writing must also disclose the tangible material on the basis of which the proper officer has formed such an opinion.

39. The power exercised by the proper officer in directing provisional attachment of the bank account of a person is quite drastic or coercive in nature resulting in attracting civil consequences. If a bank account of a person is attached, it would certainly cause severe prejudice to that person. The Legislature, whilst enacting the provisions of Section 110(5) of the Act was conscious of the severity of such power and the serious consequences which would emanate from the provisional attachment of any property, including a bank account, of a taxable person, and, therefore, it conditioned the exercise of the power by employing specific statutory language of an approval to be sought by the proper officer from the Principal Commissioner or Commissioner, who is a high ranking officer. Thus, such power is not left to the *ipse dixit* of the proper officer and any such decision is required to undergo a rigorous scrutiny of the Principal Commissioner or the Commissioner. Each of these components of Section 110(5) are integral to a valid exercise of power. In other words, when the exercise of power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the Principal Commissioner or the Commissioner. While conditioning the exercise of power on the formation of an opinion of the Principal Commissioner / Commissioner that, “for the purpose of protecting the interest of revenue or preventing smuggling it is necessary so to do”, it is evident that the statute has not left formation of the opinion to an unguided

subjective discretion of the proper officer or for that matter the Principal Commissioner / Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of government revenue and / or preventing smuggling.

40. Further, such provisional attachment is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallised. Therefore, an anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute. The exercise of unguided discretion would not be permissible because it would leave persons and their legitimate business activities to the peril of arbitrary power.

41. Each of the ingredients of Section 110(5) must be strictly complied with before the provisional attachment on the property of an assessee can be levied. The proper officer must be alive to the fact that such provisions are not intended to make preemptive strikes on the property of the assessee, merely because such property is available for being attached.

42. Further, considering the drastic nature of this power, in our view, such an order in writing directing provisional attachment should be served not only on the bank but also on the bank account holder, as, in the absence of such an order in writing being served on the bank account holder, it will be at a great disadvantage if he deems fit to challenge such a provisional attachment.

43. The aforesaid position of law is well settled by the judgment of the Division Bench of this Court in the case of *Boxster Impex Pvt.Ltd. vs. Union of India* (Supra). This judgment was delivered in respect of the provisions of Section 110(5) of the Act. Paragraphs 28 to 34 of the said judgment are relevant and read as under:

“28. Section 110 deals with seizure of goods, documents and things. Sub-section (5) was inserted in Section 110 by the Finance (No.2) Act, 2019 with effect from 1st August, 2019. Sub-section (5) of Section 110 reads as under :-

“Where the proper officer, during any proceedings under the Act, is of the opinion that for the purposes of protecting the interest of revenue or preventing smuggling, it is necessary so to do, he may, with the approval of the Principal Commissioner of Customs or Commissioner of Customs, by order in writing provisionally attach any bank account for a period not exceeding six months.

Provided that the Principal Commissioner of Customs or Commissioner of Customs may, for reasons to be recorded in writing, extend such period to a further period not exceeding six months and inform such extension of time to the person whose bank account is provisionally attached, before the expiry of the period so specified.”

29. From the above it is evident that the said provision was inserted in the statute with effect from 1st August, 2019. Besides, from the tone and tenor of the sub-section it is apparent that it is not a procedural provision per se; rather it is coercive in nature, though the procedure is also laid down for giving effect to the said provision. Being a coercive provision, there has to be strict compliance to the procedure laid down. In such circumstances and having regard to its very nature, such a provision can only have prospective operation and not retrospective operation. Infact, the concerned Finance Act makes it explicit by making the provision effective from a prospective date i.e. from 1st August, 2019.

30. Letter from the office of the Principal Commissioner of Customs to the Branch Manager of IDFC Bank was issued on 1st March, 2019 for freezing of the bank account of the petitioner. This was prior to insertion of sub-section (5) in Section 110 with effect from 1st August, 2019. Therefore, it is quite clear that this provision could not have been invoked for freezing the bank account of the petitioner.

31. Even otherwise, we find that the above provision can only be invoked in the manner provided therein which can be culled out as under :-

(i) The order of attaching the bank account provisionally shall be passed in writing by a proper officer;

(ii) Such an order can be passed during any proceedings under the Customs Act;

(iii) Before passing such an order the proper officer must form an opinion that such attachment of bank account is necessary for the purposes of protecting the interest of revenue or for preventing smuggling;

(iv) Before passing such an order the proper officer must obtain prior approval of the Principal Commissioner of Customs or of Commissioner of Customs; and

(v) Such provisional attachment shall be for a period not exceeding six months.

32. As per the proviso the Principal Commissioner of Customs or Commissioner of Customs can extend such provisional attachment for a further period not exceeding six months; but he must record reasons for such extension and such extension of period has to be informed to the person whose bank account is provisionally attached before expiry of the period so specified.

33. Thus from a careful reading of sub-section (5) of Section 110 it is noticeable that several pre-conditions and procedures are mandated. It may not be necessary for an elaborate deliberation of the same in view of the fact that respondents in their affidavit have not placed on record any order passed by the Principal Commissioner of Customs or Commissioner of Customs under sub-section (5) of Section 110. Suffice it to say that an order in writing for provisional attachment of a bank account is a must before such an account can be attached. In the absence of such an order in writing respondents could not have provisionally attached the bank account of the petitioner and continued with such attachment even beyond the permissible extended period.

34. Learned counsel for the respondents could not show any other provision in the Customs Act which empowers or authorizes the customs department to freeze the bank account of a person other than sub-section (5) of Section 110. Such attachment of bank account of the petitioner on 1st March, 2019 and its continuation thereafter being in breach of Section 110(5) is therefore, without any authority of law.”

44. Further, the judgment of the Supreme Court in the case of **Radha Krishan Industries** (Supra), also lays down a clear position in the context in hand would involve. The said judgment was delivered in the context of Section 83 of the Himachal Pradesh Goods and Service Tax Act, 2017, which also provided for provisional attachment. Paragraphs 41 to 51 of the said judgment are relevant and read as under:

“41 Sub-Section (1) of Section 83 can be bifurcated into several parts. The first part provides an insight on when in point of time or at which stage the power can be exercised. The second part specifies the authority to whom the power to order a provisional attachment is entrusted. The third part defines the conditions which must be fulfilled to validate the power or ordering a provisional attachment. The fourth part indicates the manner in which an attachment is to be leveled. The final and the fifth part defines the nature of the property

which can be attached. Each of these special divisions which have been explained above is for convenience of exposition. While they are not watertight compartments, ultimately and together they aid in validating an understanding of the statute.

Each of the above five parts is now interpreted and explained below:

(i) The power to order a provisional attachment is entrusted during the pendency of proceedings under any one of six specified provisions: Sections 62, 63, 64, 67, 73 or 74. In other words, it is when a proceeding under any of these provisions is pending that a provisional attachment can be ordered;

(ii) The power to order a provisional attachment has been vested by the legislature in the Commissioner;

(iii) Before exercising the power, the Commissioner must be “of the opinion that for the purpose of protecting the interest of the government revenue, it is necessary so to do”;

(iv) The order for attachment must be in writing;

(v) The provisional attachment which is contemplated is of any property including a bank account belonging to the taxable person; and

(vi) The manner in which a provisional attachment is levied must be specified in the rules made pursuant to the provisions of the statute.

42 Under sub-Section (2) of Section 83, a provisional attachment ceases to have effect upon the expiry of a period of one year of the order being passed under sub-Section (1). The power to levy a provisional attachment has been entrusted to the Commissioner during the pendency of proceedings under Sections 62, 63, 64, 67, 73 or as the case may be, Section 74. Section 62 contains provisions for assessment for non-filing of returns. Section 63 provides for assessment of unregistered persons. Section 64 contains provisions for summary assessment. Section 67 elucidates provisions for inspection, search and seizure. Before we dwell on Section 74, it would be material to note the provisions of Section 70 which are extracted below:

“70. Power to summon persons to give evidence and produce documents. - (1) The proper officer under this Act shall have powers to summon any person whose attendance he considers necessary either to give evidence or to produce a document or any other thing in any inquiry in the same manner, as provided in the case of a civil court under the provisions of the Code of Civil Procedure, 1908, (5 of 1908).

(2) Every such inquiry referred to in sub-section (1) shall be deemed to be a "judicial proceedings" within the meaning of section 193 and section 228 of the Indian Penal Code, 1860, (45 of 1860).”

43 *A power is conferred by Section 70 upon the proper officer to summon a person whose attendance is considered necessary to give evidence or produce a document or any other things in any enquiry in the manner which is provided in the case of a civil court under the CPC.*

44 *Section 74 is extracted below:*

“74. Determination of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised by reason of fraud or any wilful mis-statement or suppression of facts. –

(1) Where it appears to the proper officer that any tax has not been paid or short paid or erroneously refunded or where input tax credit has been wrongly availed or utilised by reason of fraud, or any wilful mis-statement or suppression of facts to evade tax, he shall serve notice on the person chargeable with tax which has not been so paid or which has been so short paid or to whom the refund has erroneously been made, or who has wrongly availed or utilised input tax credit, requiring him to show cause as to why he should not pay the amount specified in the notice alongwith interest payable thereon under section 50 and a penalty equivalent to the tax specified in the notice.

(2) The proper officer shall issue the notice under sub-section (1) at least six months prior to the time limit specified in sub-section (10) for issuance of order.

(3) Where a notice has been issued for any period under sub-section (1), the proper officer may serve a statement, containing the details of tax not paid or short paid or erroneously refunded or input tax credit wrongly availed or utilised for such periods other than those covered under subsection (1), on the person chargeable with tax.

(4) The service of statement under sub-section (3) shall be deemed to be service of notice under sub-section (1) of section 73, subject to the condition that the grounds relied upon in the said statement, except the ground of fraud, or any wilful mis-statement or suppression of facts to evade tax, for periods other than those covered under sub-section (1) are the same as are mentioned in the earlier notice.

(5) The person chargeable with tax may, before service of notice under sub-section (1), pay the amount of tax alongwith interest payable under section 50 and a penalty equivalent to fifteen per cent of such tax on the basis of his own ascertainment of such tax or the tax as ascertained by the proper officer and inform the proper officer in writing of such payment.

(6) The proper officer, on receipt of such information, shall not serve any notice under sub-section (1), in respect of the tax so paid or any penalty payable under the provisions of this Act or the rules made thereunder.

(7) Where the proper officer is of the opinion that the amount paid under sub-section (5) falls short of the amount actually payable, he shall proceed to issue the notice as provided for in sub-section (1) in respect of such amount which falls short of the amount actually payable.

(8) Where any person chargeable with tax under sub-section (1) pays the said tax alongwith interest payable under section 50 and a penalty equivalent to twenty five per cent of such tax within thirty days of issue of the notice, all proceedings in respect of the said notice shall be deemed to be concluded.

(9) The proper officer shall, after considering the representation, if any, made by the person chargeable with tax, determine the amount of tax, interest and penalty due from such person and issue an order.

(10) The proper officer shall issue the order under sub-section (9) within a period of five years from the due date for furnishing of annual return for the financial year to which the tax not paid or short paid or input tax credit wrongly availed or utilised relates to or within five years from the date of erroneous refund.

(11) Where any person served with an order issued under sub-section (9) pays the tax along with interest payable thereon under section 50 and a penalty equivalent to fifty per cent of such tax within thirty days of communication of the order, all proceedings in respect of the said notice shall be deemed to be concluded.

Explanation-1. - For the purposes of section 73 and this section,-

(i) the expression "all proceedings in respect of the said notice" shall not include proceedings under section 132; and

(ii) where the notice under the same proceedings is issued to the main person liable to pay tax and some other persons, and such proceedings against the main person have been concluded under section 73 or section 74, the proceedings against all the persons liable to pay penalty under sections 122, 125, 129 and 130 are deemed to be concluded.

Explanation-2. - For the purpose of this Act, the expression "suppression" shall mean non-declaration of facts or information which a taxable person is required to declare in the return, statement, report or any other document furnished under this Act or the rules made thereunder, or failure to furnish any information on being asked for, in writing, by the proper officer."

45 Sub- Section (1) of Section 74 empowers the proper officer to serve a notice on a person chargeable with tax where it appears that

(i) Any tax has not been paid;

(ii) Tax has been short paid;

(iii) Tax has been erroneously refunded; or

(iv) Input tax credit has been wrongly availed or utilized by reason of fraud, willful statement or suppression of fact to evade tax.

46 Sub-Section (1) enables the proper officer to issue a notice to show cause for the recovery of tax, interest payable under Section 50 and the penalty equivalent to the amount of tax specified in the notice. Sub-Sections (2), (3) and (4) lay down procedural provisions which are to be followed by the proper officer.

Secondly, under sub-Section (5) of Section 74, before the service of a notice under sub-Section (1), the person who is chargeable with tax may pay the tax together with interest and a penalty equivalent to fifteen per cent of the tax on the basis of their own ascertainment of the tax or as ascertained by the proper officer and inform the proper officer of the payment having been made upon receipt of the information. Sub-Section (6) stipulates that the proper officer shall not serve any notice under sub-Section (1) in respect of the tax so paid or any penalty payable under the provisions of the Act or the Rules.

47 On the other hand, when the proper officer is of the opinion that the amount which has been paid under sub-Section (5) falls short of the amount which is actually payable, a notice under sub-Section (1) is to issue for the amount which falls short of what is actually payable. Sub-Section (8) contains a stipulation that where a person who is chargeable with tax under sub-Section (1) pays the tax together with interest and a penalty of twenty-five per cent of the tax within thirty days of the issuance of the notice, all proceedings in respect of the notice shall be deemed to be concluded. Under sub-Section (9), the proper officer after considering the representation of the person chargeable to tax is authorized to determine the amount of tax, interest and penalty due and to issue an order. A period of five years is stipulated by sub-Section (10) for the issuance of an order in sub-Section (9). Sub-Section (11) stipulates that upon service of an order under sub-Section (9), all proceedings in respect of the notice shall be deemed to be concluded upon the person paying the tax with interest under Section 50 and a penalty equivalent to 50 per cent of the tax within thirty days of the communication of an order. These provisions indicate how sub-Sections (5), (8) and (11) operate at different stages of the process.

48 Now in this backdrop, it becomes necessary to emphasize that before the Commissioner can levy a provisional attachment, there must be a formation of "the opinion" and that it is necessary "so to do" for the purpose of protecting the interest of the government revenue. The power to levy a provisional attachment is draconian in nature. By the exercise of the power, a property belonging to the taxable person may be attached, including a bank account. The attachment is provisional and the statute has contemplated an attachment during the pendency of the proceedings under the stipulated statutory provisions noticed earlier. An attachment which is contemplated in Section 83 is,

in other words, at a stage which is anterior to the finalization of an assessment or the raising of a demand. Conscious as the legislature was of the draconian nature of the power and the serious consequences which emanate from the attachment of any property including a bank account of the taxable person, it conditioned the exercise of the power by employing specific statutory language which conditions the exercise of the power. The language of the statute indicates first, the necessity of the formation of opinion by the Commissioner; second, the formation of opinion before ordering a provisional attachment; third the existence of opinion that it is necessary so to do for the purpose of protecting the interest of the government revenue; fourth, the issuance of an order in writing for the attachment of any property of the taxable person; and fifth, the observance by the Commissioner of the provisions contained in the rules in regard to the manner of attachment. Each of these components of the statute are integral to a valid exercise of power. In other words, when the exercise of the power is challenged, the validity of its exercise will depend on a strict and punctilious observance of the statutory pre-conditions by the Commissioner. While conditioning the exercise of the power on the formation of an opinion by the Commissioner that "for the purpose of protecting the interest of the government revenue, it is necessary so to do", it is evident that the statute has not left the formation of opinion to an unguided subjective discretion of the Commissioner. The formation of the opinion must bear a proximate and live nexus to the purpose of protecting the interest of the government revenue.

49 *By utilizing the expression "it is necessary so to do" the legislature has evinced an intent that an attachment is authorized not merely because it is expedient to do so (or profitable or practicable for the revenue to do so) but because it is necessary to do so in order to protect interest of the government revenue. Necessity postulates that the interest of the revenue can be protected only by a provisional attachment without which the interest of the revenue would stand defeated. Necessity in other words postulates a more stringent requirement than a mere expediency. A provisional attachment under Section 83 is contemplated during the pendency of certain proceedings, meaning thereby that a final demand or liability is yet to be crystallized. An anticipatory attachment of this nature must strictly conform to the requirements, both substantive and procedural, embodied in the statute and the rules. The exercise of unguided discretion cannot be permissible because it will leave citizens and their legitimate business activities to the peril of arbitrary power. Each of these ingredients must be strictly applied before a provisional attachment on the property of an assessee can be levied. The Commissioner must be alive to the fact that such provisions are not intended to authorize Commissioners to make preemptive strikes on the property of the assessee, merely because property is available for being attached. There must be a valid formation of the opinion that a provisional attachment is necessary for the purpose of protecting the interest of the government revenue.*

50 *These expressions in regard to both the purpose and necessity of provisional attachment implicate the doctrine of proportionality. Proportionality mandates the existence of a proximate*

or live link between the need for the attachment and the purpose which it is intended to secure. It also postulates the maintenance of a proportion between the nature and extent of the attachment and the purpose which is sought to be served by ordering it. Moreover, the words embodied in sub-Section (1) of Section 83, as interpreted above, would leave no manner of doubt that while ordering a provisional attachment the Commissioner must in the formation of the opinion act on the basis of tangible material on the basis of which the formation of opinion is based in regard to the existence of the statutory requirement. While dealing with a similar provision contained in Section 45 (Section 45 (1) provides as follows:

“45. Provisional attachment. - (1) Where during the tendency of any proceedings of assessment or reassessment of turnover escaping assessment, 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 belonging to the dealer in such manner as may be prescribed.” of the Gujarat Value Added Tax Act 2003 , one of us (Hon’ble Mr Justice MR Shah) speaking for a Division Bench of the Gujarat High Court in Vishwanath Realtor v State of Gujarat Special Civil No.7210 of 2015, decided on 29 April 2015 observed:

“8.3. Section 45 of the VAT Act confers powers upon the Commissioner to pass the order of provisional attachment of any property belonging to the dealer during the pendency of any proceedings of assessment or reassessment of turnover escaping assessment. However, the order of provisional attachment can be passed by the Commissioner when the Commissioner is of the opinion that for the purpose of protecting the interest of the Government Revenue, it is necessary so to do. Therefore, before passing the order of provisional attachment, there must be an opinion formed by the Commissioner that for the purpose of protecting the interest of the Government Revenue during the pendency of any proceedings of assessment or reassessment, it is necessary to attach provisionally any property belonging to the dealer.

However, such satisfaction must be on some tangible material on objective facts with the Commissioner. In a given case, on the basis of the past conduct of the dealer and on the basis of some reliable information that the dealer is likely to defeat the claim of the Revenue in case any order is passed against the dealer under the VAT Act and/or the dealer is likely to sale his properties and/or sale and/or dispose of the properties and in case after the conclusion of the assessment/reassessment proceedings, if there is any tax liability, the Revenue may not be in a position to recover the amount thereafter, in such a case only, however, on formation of subjective satisfaction/opinion, the Commissioner may exercise the powers under Section 45 of the VAT Act.”

(emphasis supplied)

51 We adopt the test of the existence of “tangible material”. In this context, reference may be made to the decision of this Court in the *Commissioner of Income Tax v Kelvinator of India Limited (2010) 2 SCC 723*. Mr Justice SH Kapadia (as the learned Chief Justice then was) while considering the expression “reason to believe” in Section 147 of the Income Tax Act 1961 that income chargeable to tax has escaped assessment inter alia by the omission or failure of the assessee to disclose fully and truly all material facts necessary for the assessment of that year, held that the power to reopen an assessment must be conditioned on the existence of “tangible material” and that “reasons must have a live link with the formation of the belief”. This principle was followed subsequently in a two judge Bench decision in *Income Tax Officer, Ward No. 162 (2) v Techspan India Private Limited (2018) 6 SCC 685*. While adverting to these decisions we have noticed that Section 83 of the HPGST Act uses the expression “opinion” as distinguished from “reasons to believe”. However for the reasons that we have indicated earlier we are clearly of the view that the formation of the opinion must be based on tangible material which indicates a live link to the necessity to order a provisional attachment to protect the interest of the government revenue.”

45. In the present case, before provisionally attaching the bank accounts of Petitioners, the proper officer has not passed any order in writing which fulfils the requirements of Section 110(5) of the Act. No such order in writing has been placed on record before us by the Respondents. In fact, in paragraph 11 of its Affidavit in Reply, Respondent No.3, quite surprisingly, contended that, as per the provisions of Section 110(5) of the Act, no written order for provisional attachment of a bank account is required to be passed. The relevant part of paragraph 11 of the Affidavit in Reply of Respondent No.3 reads as under:

“As per the provision of the Section 110(5) of the Customs Act, 1962, no written order for provisional attachment of a Bank Account is required to be passed and the letter issued to the bank for provisional attachment is deemed to be an Order which issued with the approval of the Principal Commissioner of Customs or Commissioner of Customs.”

46. Further, for the reasons given by us earlier, it is our view that such an order in writing ought to have been served on the Petitioner / bank account holder. In paragraph 9 of the Affidavit in Reply of Respondent No.3, it is

wrongly contended that there is no provision or requirement for informing or serving any notice to the account holder.

47. In our view, the aforesaid interpretations sought to be placed by the Respondents on the provisions of Section 110(5) of the Act are ex-facie oblivious to the settled principles of law as enunciated by the Supreme Court and, if, accepted virtually make a mockery of the provisions of Section 110(5) and deprive the Petitioners of all the safeguards provided in Section 110(5) before the power of provisional attachment can be exercised. As stated hereinabove, in the present case, no order in writing records the opinion of the proper officer, namely that, for the purpose of protecting the interests of revenue or preventing smuggling, it had become necessary to provisionally attach the bank accounts of the Petitioners. In our view, there is a total non-compliance of the provisions of Section 110(5) of the Act while provisionally attaching the bank accounts of the Petitioners. For this reason, the provisional attachment on all the bank accounts of the Petitioners will have to be declared as illegal and lifting the impugned provisional attachment and defreezing of the bank accounts of the Petitioners will have to be directed.

48. As far as the issue of jurisdiction as raised by the Respondents is concerned, we are not at all inclined to accept the same. Although the letters to the banks directing them to provisionally attach the bank accounts have been issued from Rajasthan, the bank accounts which have been provisionally attached are all in Mumbai, within the territorial jurisdiction of this Hon'ble Court. Thus, Clause (2) of Article 226 is clearly attracted. In these circumstances, as a part of the cause of action clearly arises within the territorial jurisdiction of this Court, this Court would have jurisdiction to entertain these Petitions so as to issue a writ under the powers conferred under Article 226 of the Constitution.

49. In the light of the aforesaid discussion, we allow these Petitions in terms of the following orders:

ORDER

- a. It is declared that the provisional attachment of the bank accounts of the Petitioners is illegal and contrary to the provisions of Section 110(5) of the Act.
- b. The said provisional attachment of the bank accounts of the Petitioners is hereby set aside and the Respondent banks are directed to permit the Petitioners to operate their respective bank accounts without any hindrance.
- c. Needless to observe that it is however, always open to Respondent Nos.2 and 3 to provisionally attach the bank accounts of the Petitioners by following the due procedure in law.
- d. Rule in all the Writ Petitions is made absolute in the above terms.
- e. In the facts and circumstances of the case, there will be no order as to costs.

(FIRDOSH P. POONIWALLA, J.)

(G. S. KULKARNI, J.)