

(2018) 02 DEL CK 0157

In the Delhi High Court

Case No : Civil Writ Petition No. 4517 Of 2017, Civil Miscellaneous Application
No. 19724 Of 2017

Balvir Singh

APPELLANT

Vs

Securities & Exchange Board Of India & Ors

RESPONDENT

Date of Decision : 05-02-2018

Acts Referred:

Security And Exchange Board Of India Act, 1992 — Section 11, 11B 11(2)(i)(a), 15,
15T, 19, 20A(1)(b), 24
Income Tax Act, 1961 — Section 226
Securities And Exchange Board Of India (Collective Investment Schemes) Regulations,
1999 — Regulation 65, 73

Citation : (2018) 02 DEL CK 0157

Hon'ble Judges : Rajiv Shakdher, J

Bench : Single Bench

Advocate : Sunil Kumar, Hiren Dasan, Uday Gupta, Chand Qureshi, Shanti
Pandey, M.K. Tripathi, Neeraj Malhotra, Ashish Aggarwal, Surabhi Anand

Final Decision : Disposed Of

Judgement

Rajiv Shakdher, J

1. This petition is directed against the order dated 24.03.2017 passed by the Recovery Officer, Securities and Exchange Board of India (hereafter

referred to as "Recovery Officer"). By virtue of this order, the Recovery Officer has in effect, attached all accounts, lockers whether held singly

or jointly by the petitioner.

2. It is not in dispute that pursuant to this order, amounts lying in the savings bank account no.50014413159 and 50014413024 of the petitioner

maintained with the Allahabad Bank, Zirak Pur, Chandigarh have been remitted to the respondent no.1 i.e., the Board.

3. A perusal of the impugned order would show that it has been passed by the Recovery Officer in exercise of powers conferred upon him under

Section 20A (1) (b), 11 (2) (i) (a) of the Security and Exchange Board of India Act, 1992 (in short, the SEBI Act) read with Section 226 and Second

Schedule of the Income Tax Act, 1961.

4. The basis for passing the impugned order is order of the Securities and Exchange Board of India is Board (in short "Board") dated 21.06.2013.

The reason as to why the Board proceeded to pass said order is broadly as follows: -

4.1 It appears that a company by the name: Alchemist Infra Reality Ltd. (for short "Alchemist") had launched collective investment scheme via

which moneys in excess of `1087 crores were collected from investors as on March 2011. The Board found fault both with Alchemist and its

Directors and accordingly by order dated 21.06.2013 issued a slew of directions. These directions were issued by the Board in exercise of powers

vested in it under Section 19 read with Sections 11 and 11 (B) of the SEBI Act as well as Regulations 65 and 73 of the SEBI (Collective Investment

Schemes) Regulations, 1999 (in short "1999 Regulations"). The operative directions issued by the Board read as follows: -

(a) Alchemist Infra Reality Limited shall not collect any money from investors or launch or carry out any scheme which has been identified

as a collective investment scheme in this Order.

(b) Alchemist Infra Reality Limited and its Directors including Mr. Brij Mohan Mahajan, Mr. Sunil Kanti Kar and Mr. Narayan Madhav

Kumar shall wind up the existing collective investment schemes and refund the money collected by the said company under the schemes with

returns which are due to its investors as per the terms of offer within a period of three months from the date of this Order and submit a

winding up and repayment report to SEBI in accordance with the SEBI (Collective Investment Schemes) Regulations 1999, failing which the

following actions shall follow:

(i) SEBI would initiate prosecution proceedings under Section 24 and adjudication proceedings under Chapter VI of the Securities and

Exchange Board of India Act, 1992 against Alchemist Infra Reality and its Directors;

(ii) SEBI would make a reference to the State Government/Local Police to register a civil/criminal case against Alchemist Infra Realty

Limited and its Directors and its Managers/persons in-charge of the business and its schemes for offences of fraud, cheating, criminal

breach of trust and misappropriation of public funds; and

(iii) SEBI would make a reference to the Ministry of Corporate Affairs, to initiate the process of winding up of the company, Alchemist Infra

Reality Limited.

(c) Alchemist Infra Reality Limited and its Directors Mr. Brij Mohan Mahajan, Mr. Narayan Madhav Kumar, Mr. Balvir Singh, Mr.

Chandra Shekhar Chauhan and Mr. Sunil Kanti Kar are restrained from accessing the securities market and are prohibited from buying,

selling or otherwise dealing in securities market till all the collective investment schemes are wound up by the Company and all the monies

mobilized through such schemes are refunded to its investors with returns which are due to them.

5. As is evident from the aforesaid directions, the Board enjoined Alchemist from collecting any money from investors or from launching or carrying

out any scheme of the nature of a collective investment scheme as adverted to in its order. Furthermore, the Board also directed Alchemist and its

Directors to wind up the subsisting collective investment scheme and to refund the money collected with returns which were due to the investors as

per terms of the offer made to them. The time frame given for this purpose was three months which was to commence from the date of its order. In

addition to the aforesaid, other directions were also issued with which I am not presently concerned, though they have been extracted hereinabove.

5.1 More importantly, Alchemist and its Directors which included the petitioner were restrained from accessing the security market and were

prohibited from buying, selling or otherwise dealing in securities market till all the collective investment schemes were wound up by Alchemist and all

moneys mobilized via such schemes were refunded to its investors with returns due against them.

6. Insofar as the operative directions are concerned, there is difference of view as between the petitioner and the respondents as to what is the scope,

effect and ambit of those directions. The difference, to put it precisely, emanates

from directions contained in paragraph 50 (b) and 50 (c) of the Board's order. A close perusal of the directions contained therein would show that while Alchemist and some of its Directors, i.e., Brij Mohan Mahajan, Sunil Kanti Kar and Narayan Madhav Kumar were mulct with responsibility of winding up the collective investment scheme and refund the money to the investors. The direction contained in paragraph 50 (c) of the very same order, which specifically, adverted to the petitioner and another Director, namely, Mr. Chandra Shekhar Chauhan, restrained Alchemist and its directors from accessing the securities market and from buying, selling or otherwise dealing in securities till the collective investment schemes were wound up and all moneys were refunded to its investors along with returns.

7. Therefore, the difference lies in the fact that while the directions contained in paragraph 50 (b) named some Directors and Alchemist excluding the petitioner and Mr. Chandra Shekhar Chauhan, in paragraph 50 (c) a specific reference is made to the petitioner and Mr. Chandra Shekhar Chauhan.

8. Thus, the argument advanced on behalf of the petitioner is that the liability and so called responsibility to wind up the collective investment scheme and refund the money to the investors does not fall upon the petitioner.

8.1 The reason advanced in support of this argument is that the petitioner remained a Director of Alchemist between 2.4.2008 and 9.2.2009. In other words, the emphasis is on the fact that since the petitioner ceased to be the Director in Alchemist w.e.f. 9.2.2009, this aspect was taken into account by the Board while framing its order. To buttress this argument, my attention is drawn to Alchemist's letter dated 13.06.2013 addressed to the

Board whereby information was given that the petitioner had ceased to remain its Director.

9. It would be relevant to note that the factum of petitioner's tenure has been adverted to by the Board in paragraph 49 of its order.

9.1 Therefore, taking a cue from the same, the petitioner argues that the Board consciously drew a distinction between those Directors who were concerned with the affairs of the company at the relevant point of time and those who had already left the company and ceased to be on its Board of Directors.

9.2 Argument is that the liability or responsibility to wind up the company and to

refund the money to investors was foisted by the Board on Alchemist and the Directors mentioned in paragraph 50 (b) i.e., Brij Mohan Mahajan, Mr. Sunil Kanti Kar and Mr. Narayan Madhav Kumar. It is, however, disputed by the petitioner that since he was Director for some period of time, the injunction contained in paragraph 50 (c) of the order of the Board would apply to him as well, which was that he could not access the securities market and was prohibited from buying, selling or otherwise dealing in securities till all collective investment schemes are wound up and moneys refunded to the investors by the Directors mentioned in paragraph 50 (b) of the Board's order. It is, precisely, for this reason that the petitioner says that he is not aggrieved by the order of the Board.

10. On the other hand, Mr. Neeraj Malhotra, senior counsel who appears on behalf of SEBI says that this writ petition is not maintainable for the reason that the petitioner can take recourse to the alternative remedy. In this regard, learned counsel drew my attention to Section 15T of the SEBI Act and also drew my attention to Clause 11 of the Second Schedule to the Income Tax Act, 1961. Mr. Neeraj Malhotra submits as against the order of the Board, appeal lies under Section 15T of the SEBI Act and, likewise, as against the order impugned which is the order of the Recovery Officer, the petitioner could prefer objections under Clause 11 of the Second Schedule of the Income Tax Act, 1961.

11. At this juncture, I may also note that the learned senior counsel who appears for the petitioner in the context of the impugned order has made another submission, which is, that the impugned order of attachment was passed simultaneously with the issuance of the recovery certificate without giving requisite notice prior to issuance of the impugned order of attachment. In support of this submission, learned senior counsel refers to Clauses 2 and 3 of the Second Schedule of the Income Tax Act, 1961. It is, thus, submitted that soon after the recovery certificate was issued, the Recovery Officer proceeded to attach the property, i.e., the bank accounts of the petitioner without issuing notice as required under Clause 2 of the Second Schedule of the Income Tax Act, 1961 by assuming that the petitioner was a defaulter.

12. I have heard the learned counsel for the parties and perused the records. According to me so far as the first submission made by Mr. Neeraj

Malhotra is concerned, which is, that the appeal would lie under Section 15 of the SEBI Act is not required to be dealt with, as according to the petitioner, he is not aggrieved by the order of the Board. Therefore, quite naturally, the appeal provided under Section 15T of the SEBI Act is a remedy which the petitioner does not wish to take recourse to. Surely, this Court cannot force the petitioner to do something which he does not desire to do, especially, in the circumstances where it is the petitioner's contention that the order if read in its entirety is in his favour. Since, there is no grievance the petitioner does not wish to take recourse to an appeal qua the order of the Board.

13. I may also place on record a fact qua which counsel for both the sides agree which is that the order of the Board was taken in appeal to the Securities Appellate Tribunal by alchemist and its directors other than the petitioner whereupon some modifications were made in the order of the Board. The matter thereafter was carried in appeal to the Supreme Court where the appeal filed by the alchemist and Directors failed. In that sense, the order of the Board has attained finality.

14. In so far as the other submission made by Mr. Neeraj Malhotra is concerned that the objections could be filed with the Recovery Officer in my view, is a viable argument except that it does not meet with the grievance of the petitioner which is that before passing the impugned order of attachment, no notice as was required to be issued under Clause 2 of the Second Schedule of the Income Tax Act, 1961 was served upon him. Counsel for petitioner also relies upon Clause 3 of the very same schedule to emphasize the fact that the moratorium of 15 days provided in Clause 2 for payment dues was so sacrosanct that that no recovery proceedings could be initiated before the expiry of said time frame which commenced from the date when notice was served on the petitioner. For a greater clarity, Clause 2, 3 and Clause 11 of Second Schedule of the Income Tax Act, 1961 are extracted hereafter: -

2. When a certificate has been drawn up by the Tax Recovery Officer] for the recovery of arrears under this Schedule, the Tax Recovery Officer shall cause to be served upon the defaulter a notice requiring the defaulter to pay the amount specified in the certificate within fifteen days from the date of service of the notice and intimating that in default

steps would be taken to realise the amount under this Schedule.

3. No step in execution of a certificate shall be taken until the period of fifteen days has elapsed since the date of the service of the notice

required by the preceding rule:

Provided that, if the Tax Recovery Officer is satisfied that the defaulter is likely to conceal, remove or dispose of the whole or any part of

such of his movable property as would be liable to attachment in execution of a decree of a civil court and that the realisation of the amount

of the certificate would in consequence be delayed or obstructed, he may at any time direct, for reasons to be recorded in writing, an

attachment of the whole or any part of such property:

Provided further that if the defaulter whose property has been so attached furnishes security to the satisfaction of the Tax Recovery Officer,

such attachment shall be cancelled from the date on which such security is accepted by the Tax Recovery Officer.

11. (1) Where any claim is preferred to, or any objection is made to the attachment or sale of, any property in execution of a certificate, on

the ground that such property is not liable to such attachment or sale, the Tax Recovery Officer shall proceed to investigate the claim or

objection :

Provided that no such investigation shall be made where the Tax Recovery Officer considers that the claim or objection was designedly or

unnecessarily delayed.

(2) Where the property to which the claim or objection applies has been advertised for sale, the Tax Recovery Officer ordering the sale may

postpone it pending the investigation of the claim or objection, upon such terms as to security or otherwise as the Tax Recovery Officer

shall deem fit.

(3) The claimant or objector must adduce evidence to show thatâ?

(a) (in the case of immovable property) at the date of the service of the notice issued under this Schedule to pay the arrears, or

(b) (in the case of movable property) at the date of the attachment, he had some interest in, or was possessed of, the property in question.

(4) Where, upon the said investigation, the Tax Recovery Officer is satisfied that, for the reason stated in the claim or objection, such

property was not, at the said date, in the possession of the defaulter or of some person in trust for him or in the occupancy of a tenant or

other person paying rent to him, or that, being in the possession of the defaulter at the said date, it was so in his possession, not on his own

account or as his own property, but on account of or in trust for some other person, or partly on his own account and partly on account of

some other person, the Tax Recovery Officer shall make an order releasing the property, wholly or to such extent as he thinks fit, from

attachment or sale.

(5) Where the Tax Recovery Officer is satisfied that the property was, at the said date, in the possession of the defaulter as his own property

and not on account of any other person, or was in the possession of some other person in trust for him, or in the occupancy of a tenant or

other person paying rent to him, the Tax Recovery Officer shall disallow the claim.

(6) Where a claim or an objection is preferred, the party against whom an order is made may institute a suit in a civil court to establish the

right which he claims to the property in dispute; but, subject to the result of such suit (if any), the order of the Tax Recovery Officer shall be

conclusive.â??

15. A close perusal of Clause 2 would show that after the recovery certificate is drawn up by the Recovery Officer for recovery of arrears, he is

required to serve upon the defaulter a notice demanding the payment of money referred to in the recovery certificate. For this purpose, the Recovery

Officer is required to give the defaulter a period of 15 days which commences from the date of service of notice. The demand notice is required to

indicate that if default is made, steps that would be taken thereafter to realize the amount indicated therein.

15.1 Furthermore, Clause 3 of the Second Schedule of the Income Tax Act, 1961 provides that no steps for recovery would be taken till the period of

15 days has elapsed. Therefore, there is a sanctity attached to both the issuance of notice and the 15 days moratorium referred to in Clause 2 of the

Second Schedule. The only ground on which the Recovery Officer can side step the rigour of Clause 2 of the Second Schedule is when he is satisfied

that the defaulter i.e., notice is likely to conceal, remove or dispose of whole or any part of his movable property which is liable to attachment as in the execution of the decree of the Civil Court, and as a result thereof the realization of the amount reflected in the certificate would get delayed or obstructed.

16 If this position is taken by the Recovery Officer, he has to state his reasons in writing to support the order of attachment which is issued without prior notice to the defaulter.

17 A close perusal of the impugned order would show that in paragraph 2, all that the Recovery Officer has stated is that he has reasons to believe that the defaulter, i.e., the petitioner would dispose of the amounts/proceeds credited to his bank account. According to me, the averments therein do not meet the requirement of the proviso to Clause 3 of the Second Schedule. The powers conferred with the Recovery Officer are akin to the powers available to a Civil Court to pass an order of attachment before judgment. The rigour contained therein and the principles analogous thereto would apply in equal measure when power of attachment of a defaulter is exercised under second schedule of the Income Tax Act, 1961. The assertions in paragraph 2 of the impugned order are vague and do not reflect the need or the reason for doing away with the rigour of providing 15 days leeway to the defaulter of paying the amount reflected in the recovery certificate.

18. In my view, the petitioner has been able to make out the case that the order which has been passed is non-est as it takes away a vital right conferred upon the notice/defaulters under Clause 2 of the Second Schedule of the Income Tax Act, 1961.

19. Accordingly, the impugned order is set aside giving liberty to the Recovery Officer to issue a fresh demand notice pursuant to the recovery certificate drawn up by him as required under Clause 2 of the Second Schedule of the Income Tax Act, 1961. The only caveat being is that since moneys have already been transmitted to the Board, it will retain the same in trust till such time the Recovery Officer passes a final order after issuance of notice, giving due opportunity to the petitioner to respond to the same.

19.1 In case the Recovery Officer agrees with the contention of the petitioner that in terms of the order of the Board, he could not have been

characterized as the defaulter, the logical corollary would be that the Board would have to return the moneys held in trust by it. Needless to say if the

Recovery Officer reaches a contrary conclusion, then, the Board would continue to hold the moneys and use the same as mandated by law.

20. With the aforesaid observations, the writ petition is disposed of.

21. At this stage, Mr. Neeraj Malhotra, learned senior counsel advances further submissions. First, that under Section 19 the Board is entitled to

delegate the powers and that the Recovery Officer issued the impugned attachment order as the delegate of the Board. Second, that a notice was

issued to the petitioner prior to the issuance of the impugned attachment order.

22. According to me, both submissions are not tenable. Reason why I have reached this conclusion is this: First, if the Board had delegated its power

to the Recovery Officer, the order of delegation ought to have been placed on record. Mr. Neeraj Malhotra, fairly concedes that no such order has

been placed on record. Second, I have my doubts whether Recovery Officer will fall within the ambit of the term “delegatee” since the Section as

it is presently framed does not allow for such an interpretation. However, I need not delve further on this aspect of the matter as the order of

delegation has not been placed on record.

22.1 The other submission that a notice was issued to the petitioner prior to the issuance of the impugned order is not backed, even according to Mr.

Malhotra, by relevant material and/or evidence which would demonstrate that it was served on the petitioner. Mr. Malhotra, as a matter of fact, fairly

concedes that there is nothing on the record to show that the notice was served on the petitioner. In these circumstances, I am of the view that no

alteration of the conclusion reached above by me, is called for.

23. The writ petition, as indicated above, is disposed of in the aforementioned terms, along with pending application.