

(2017) 11 DEL CK 0014

In the Delhi High Court

Case No : Execution Petition No. 381 Of 2012, Execution Application (OS) No. 66, 67 Of 2017

SUNIL KUMAR

APPELLANT

Vs

M/S STOCK GURU INDIA LTD & ANR

RESPONDENT

Date of Decision : 13-11-2017

Acts Referred:

Constitution Of India, 1950 — Article 226
Income Tax Rules, 1962 — Rule 4, 9
Income Tax Act, 1961 — Section 132, 132(5), 132(10), 132(11), 132(12), 132B, 193(11), 226, 226(4), 292C, 293
Limitation Act, 1963 — Section 14
Indian Trusts Act, 1882 — Section 86

Citation : (2017) 11 DEL CK 0014

Hon'ble Judges : Yogesh Khanna

Bench : SINGLE BENCH

Advocate : Tanmaya Mehta, Piyush Singh, Nivedita Grover, Sanjiv Rajpal, Kawaljit Kaur, Romila Joshi,

Final Decision : Dismissed

Judgement

EX.APPL.(OS) 290/2014

1. This application is moved by the Deputy Commissioner of Income Tax, Central Circle-3, New Delhi under section 226(4) of the Income Tax Act, 1961 for recovery of income tax with interest, recoverable from the judgment debtor for the A.Y. 2010-2011 & 2011-2012 pursuant to assessment orders and the demand notices for a total sum of Rs.345,97,46,125/-, served upon the assessee u/s 156 (2) of the Income Tax Act, 1961.

2. The applicant submits that on 18.01.2011 a search and seizure operation u/s 132 of Income Tax Act, 1961 was carried out by the Investigation Wing of Income Tax Department at various residential and office premise of Judgment Debtor(SGI Group) when number of incriminating documents including the cash of Rs.34,69,00,000/- was seized. The Judgment Debtor is a partnership firm

formed by Sh. Lokeshwar Dev and his wife Smt. Priyanka Saraswat Dev and is the flagship concern of the SGI Group, was carrying on systematic business but not reflecting the correct income in its books of accounts as required under the Income Tax Act, 1961.

3. The seized amount since has to be appropriated towards tax demand in terms of Section 132B of the Income Tax Act, 1961 on determination of the tax liability of the Judgment Debtor pursuant to the assessment of its undisclosed income determined on completion of the assessment proceeding.

4. It is alleged that the judgment debtor was accepting deposit from the public and offering return on the deposits. The group has claimed that they had the expertise in stock and commodity market and the deposits collected were used by the group for trading in equity and commodity market, speculative business, FDR and investment in real estate. SGI had several plans which they offered to the investors. The deposits were collected from the investors through agents. These Investors /agents were allowed to refer and introduced any other person to be an investor/agent in the firm under their downline as they would receive referral commission on the investment of the said new referred person.

5. The decree holder who has been one of the investors of the Judgment Debtor filed the suit for recovery against the judgment debtors on the premise he has been defrauded by the judgment debtors and a money decree of Rs. 1.60 crore was passed by this Court on 16.08.2012 which is now sought to be executed by way of this present execution. On an application of the HDFC bank this Court vide order dated 20.03.2013, keeping in view the attachment orders qua the bank accounts of the judgment debtor already passed by the income tax department vide order dated 11.01.2013, direct it not to release any payment from the said account to any party without taking leave of this Court.

6. The block assessment of the Judgment Debtor pursuant to search operation and in terms of the post search enquiry has been completed on 06.11.2013 and in terms thereof the demand has been raised on them. The assessment orders of Judgment Debtor for the assessment years 2010-2011 and 2011-2012 alone determined its tax liability for these 2 years at Rs.345,97,46,885/-.The copy of the demand notices issued u/s 156 (2) of the Income Tax Act, 1961 are attached.

7. It is averred the applicant has put the bank accounts of the Judgment Debtors under attachment u/s 226 of the I.T. Act, 1961 and one such bank account with HDFC Bank, Dwarka Branch, New Delhi has also been attached whose bank account No. is 02498630000147. The applicant has filed this application for recovery of the tax demand raised against the applicant and it has issued the attachment order u/s 221 of the Income Tax Act, 1961 to secure the interest of the revenue being authorized in law to recover the same. Hence it prays for a direction to release the sum to the applicant as the amount belonging to the judgment debtor deposited by it in the HDFC Bank, Dwarka Branch, New Delhi has been freezed for meeting the tax liability arisen against it.

8. It is submitted by the learned counsel for the Income Tax Department that if the Decree Holder has any grievance against the attachment, the appropriate provision would be under Section 193(11) of the Income Tax Act, 1961 where he could have applied to get a favourable order but since no such application was filed, the execution proceedings to recover the amount lying attached under the orders of the Income Tax Department would be against the bar of Section 293 of the Income Tax Act.

9. In support of his submission the learned counsel for Income Tax Department has relied upon *Rakesh Kumar Agarwal V. Bansal Commodities* (2013) 39 Taxmann.com 136 (Delhi) which read as under:-

22. As noticed, the facts are that duly authorized Income Tax Officers carried out search and seizure operations at the residential and business premises of M/s. Bansal Commodities on 27th April, 1989. During these, seven Pay Orders for Rs.50.40 lakhs, prepared from the accounts on 26th April, 1989 were found. The Income Tax officials, on 28th April, 1989 issued a deemed seizure order with respect to the 7 pay orders for Rs.50.40 lakhs and served it upon the Manager, Punjab National Bank. The original pay orders were in the control and possession of the plaintiffs, M/s. Bansal Commodities. The plaintiffs, resultantly did not present the pay orders for payment and approached Income Tax Authorities with respect the same. Income tax proceedings then onward rambled on. Finally, the plaintiff's efforts at securing release from the Income tax authorities ended, with an order by the CIT, rejecting their application under Section 132 (11). They approached this Court, challenging that order, under Article 226 of the Constitution of India. On 20th May, 2004, that writ petition was dismissed, relegating M/s. Bansal Commodities to a civil Court for its remedies by way of a suit, through a consent order. The suit, filed later, was decreed in full, by the impugned judgment. The first objection to the impugned judgment is that it was barred by Section 293 of the Income Tax Act; the second argument of the appellants is that the learned Single Judge should not have entertained the suit since no ground to give the benefit of Section 14 of the Limitation Act, had been made out. 23. The issue presented before the Court is whether the present proceedings are barred by Section 293 of the Income Tax Act. The section reads:

"293. Bar of suits in Civil Courts. No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act; and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act." 24. The fact that the assessment conducted as against Rakesh Kumar Agrawal was closed, and proceedings under Section 132 - along with the objections presented under Section 132 (10), which were considered and rejected under Section 123 (12) - were carried out is clear in this case. The Section 132 proceedings and the deemed seizure of the seven pay orders (and the representative amount) as against Mr. Kumar's tax dues were conducted and finalized in accordance with the procedure under that provision,

and to that action, there is no dispute in this case. The question, then, is whether the present suit - deciding the liability of Rakesh Kumar Agrawal to M/s. Bansal Commodities - is barred. There can be no dispute that the question of liability itself, as a matter of a contractual agreement between the parties, is a matter properly reserved for the jurisdiction of the civil court. The question, here, however, does not concern the private remedies that lie between the two parties in this case, but whether, the ownership of the seven pay orders - seized by the income tax authorities under Section 132 - can be subject matter of the present suit.

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26. As in this case, the Revenue may not adjudicate on the question of liability of Mr. Agrawal to Bansal Commodities, just as in Parmeshwari, the Supreme Court held that:

"[i]t (was) not the case of the Revenue that Income Tax Authority can grant decree for partition."

Neither is it true that such a construction of Section 293 leaves third parties without a remedy. Section 132(11) provides the third person, (in this case M/s. Bansal Commodities), with the necessary opportunity to present its case or claim that it is the real and true owner or the beneficial owner of the proceeds (or amounts) under the seven pay orders, before the Income Tax authorities. That was, in fact, done in this case. The result of the present suit being held to be maintainable and the judgment of the Learned Single Judge allowed to operate, would be, in the words of the Supreme Court:

"the direct effect of getting that order of the Income-tax Officer under Section 132(5) of the Act set aside or modified to that extent. This Section 293 does not permit..." Equally, the Supreme Court noted that: "Section 293 is quite specific and does not admit of any ambiguity if ultimately a suit is to result in a decree or order which sets aside or modifies any proceeding taken or order made under the Act, that suit would not be maintainable. We are not concerned with the frame of the suit as such but to see the ultimate result to which the suit as such but to see the ultimate result to which the suit would lead to.". 27. Similarly, this question was also considered by this Court in Prem Kumar and Sons (HUF) v. Union of India and Ors., [2006] 280 ITR 152 (Delhi), where the Income Tax authorities proceeded under Section 132 to seize certain assets alleged to belong to the Hindu Joint Family from the appellant assessee. The appellant had also filed a suit against the Income Tax authorities for recovery of a certain amount as for financial loss the plaintiff had suffered as a result of loss of interest on the maturity value of the financial assets seized. In that proceeding, the Single Judge Court dismissed the suit given the provisions of Section 293, and on appeal, the Court noted that where a specific remedy is available under Section 132 (in that case the remedy lay in the provisions on payment of interest under Section 132B), the jurisdiction of the Civil Court

remains barred. In this case, M/s. Bansal Commodities clearly had recourse to Section 132(11), which they took advantage of, though ultimately their view was rejected by the Income Tax authorities in accordance with the statutory discretion vested in it. Thus, Section 293 clearly comes into operation in this case.

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28. Significantly, the order under Section 132 effecting a deemed seizure of the pay orders as against the tax dues of Rakesh Kumar Agrawal continues to operate till date, having never been set aside in any writ proceeding before this Court or the Special Leave Petition before the Supreme Court. Therefore, the effect of the present suit - with the form not being determination, but rather the substance of the relief claimed - would be that the order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits the present action. The impugned judgment of the Learned Single Judge - that the ownership of the seven pay orders lies with M/s. Bansal Commodities - and the order of the CIT, i.e. that the seven pay orders are to be utilized as against the tax dues of Mr. Kumar - cannot stand together. With proceedings under Section 132 having been initiated in 1989 and having attained finality in terms of the procedure within that provision being complied with, Section 293 mandates that the jurisdiction of the civil court with respect to the present suit is barred.

10. Hence it is argued by learned counsel for the Income Tax Department that this money belong to the revenue and the decree holder has no right to recover the money attached/seized by the revenue.

11. I disagree with the submission of the learned counsel for the department. Section 293 of the Income Tax Act perhaps has no applicability in the present proceedings. It bars the filing of the suit in a civil court to set aside or modify any proceedings taken and / or made under the Income Tax Act . The Decree Holder has not filed any suit in any civil court against the revenue authorities challenging/setting aside/modifying any proceedings taken and/or made under this Act. The Decree Holder rather had filed a civil suit for recovery of his own money of Rs.1,60,00,000/- with pendetelite and further interest based on two post dated cheques issued by the Judgment Debtors. The suit was filed by the decree holder on the premise that the Judgment Debtors had cheated the Decree Holder and had committed fraud upon him. Para 4 of the Judgment dated 16.08.2012 in CS(OS)2866/2011 also notes this fact:

4. It is the case of the plaintiff that he never received any return on his investments with the defendants and when he tried to approach the defendants at their Delhi office, he found that the office was closed and the telephone numbers of the defendants were also not available. It then transpired that the defendants had been working under a pre-planned conspiracy to cheat public-at-large and had aired their advertisements on internet, and through periodically conducted seminars, so as to gain the trust of public-at-large.

Plaintiff also discovered that the bank account of the defendants on which the post dated cheques were issued, had been seized by the police even before the issuance of aforesaid cheques. Plaintiff also met other individuals who had been cheated and duped by the defendants and came to know that the police had registered FIR bearing No.84/2011, against the defendants and that the case was thereafter transferred to the Economic Offences Wing, Malviya Nagar, New Delhi. On 16.06.2011, the plaintiff served a legal notice on the defendants, terminating the agreement on account of fraud committed by the defendants and called upon the defendants to pay to the plaintiff the assured monthly return and the principal sum invested.

12. The Court then in para 7 of its judgment returned the finding:-

7. In view of the aforesaid, the suit of the plaintiff is decreed in favour of the plaintiff and against the defendants Nos.1 and 2. The defendants are held jointly and severally liable to pay to the plaintiff a sum of Rs. 1,60,00,000/- (Rupees one crore and sixty lakhs only) along with interest @ 18% per annum from the date of the institution of the suit till the date of payment. The aforesaid amount shall be paid by the defendant Nos.1 and 2 within eight weeks, failing which the defendants shall be liable to pay interest @ 20% per annum till the date of payment.

13. Thus the court believed the averments of fraud made by the decree holder against the judgment debtors.

14. Now on equity, the department of course can seize the money/properties which belong to the assessee/the judgment debtors but of none other. Now in this case the decree holder has alleged his money being Rs.1,60,00,000/- was received by the judgment debtors by cheating him and the said money belong to the decree holder and need to be returned by the judgment debtors. It is argued such money of decree holder is held by the judgment debtors in trust and the decree holder has a proprietary interest in the amount so seized to the extent of his decree.

15. Section 86 of the Indian Trusts Act, 1882 is relevant in this regard:

"86. Transfer pursuant to rescindable contract.-- Where property is transferred in pursuance of contract which is liable to rescission, or induced by fraud or mistake, the transferee must, on receiving notice to that effect, hold the property for the benefit of the transferor, subject to repayment by the latter of the consideration actually paid."

16. Per above, if the money was transferred in pursuance of a contract induced by fraud or mistake, as proved by the decree holder and so noted in judgment dated 16.08.2012 in CS(OS) No.2866/2011, the judgment debtor on receiving the notice of rescission ought to have held the money in trust for the benefit of the decree holder.

17. In The National Crime Agency V. Gary John (2014) EWHC 4384 (CH) the

Court held as under:

40.I consider that each of the lead claimants has a proprietary claim to part of the Fund on ordinary principles of law and equity. Although Mr Nicholas Cox, counsel for the NCA, highlighted several possible difficulties with such a claim, he did not at the end of the day firmly oppose it. There are two possible routes by which the lead claimants can establish a proprietary claim. The first is that, as from February 2005 when Mr Robb and AGA conspired to defraud by ceasing to honour their obligations to the investors and to transfer all investors' payments to Mr Robb for his personal use and enjoyment, Mr Robb and AGA held the payments by the lead claimants or their traceable proceeds on constructive trust for the lead claimants ("the fraud constructive trust"). The second is that, from the time when the lead claimants claimed the return of their payments, that is to say, at the latest, when they joined the present proceedings, their transactions were rescinded and their payments or their traceable proceeds were held on trust for them ("the rescission trust").

41.The fraud constructive trust was described Lord Browne-Wilkinson in the following well-known passage in *Westdeutsche* at p. 716

"I agree that [the] stolen moneys are traceable in equity. But the proprietary interest which equity is enforcing in such circumstances arises under a constructive, not a resulting, trust. Although it is difficult to find clear authority for the proposition, when property is obtained by fraud equity imposes a constructive trust on the fraudulent recipient: the property is recoverable and traceable in equity. Thus, an infant who has obtained property by fraud is bound in equity to restore it: *Stocks v. Wilson* [1913] 2 K.B. 235, 244; *R. Leslie Ltd. v. Sheill* [1914] 3 K.B. 607. Moneys stolen from a bank account can be traced in equity: *Bankers Trust Co. v. Shapira* [1980] 1 W.L.R. 1274, 1282C-E: see also *McCormick v. Grogan* (1869) L.R. 4 H.L. 82, 97".

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50.Contrary to some scholarly analysis (see *Burrows*", "The Law of Restitution" (3rd ed) pp. 174-179 and the academic material to which he refers, including, in particular, various writings of Professor Robert Chambers), I also consider that the fact that fraud only subsequently arises in a transaction which began as a legitimate transaction is not, of itself, a bar to rescission or to a constructive trust then arising. There is no binding authority on that point one way or the other: see generally the discussion in *Goff & Jones, The Law of Unjust Enrichment* (8th ed) paras. 37-07 to 37-24 on the limits of proprietary relief for unjust enrichment. Whatever may be the position in other cases, fraud is special. As Lord Bingham said in *HIH Casualty & General Insurance Ltd v Chase Manhattan Bank* [2003] UKHL 6 at paragraph [15]:

"... fraud is a thing apart. This is not a mere slogan. It reflects an old legal rule that fraud unravels all: *fraus omnia corrumpit*. It also reflects the practical basis of commercial intercourse. Once fraud is proved, "it vitiates judgments,

contracts and all transactions whatsoever": *Lazarus Estates Ltd v Beasley* [1956] 1 All ER 341 at 345, [1956] 1 QB 702 at 712 per Denning LJ."

51. I consider that there are good policy reasons for enabling a victim of fraud, which supervenes in a transaction, to set aside the transaction so as to pursue a proprietary claim even though that will have priority over other unsecured creditors of the fraudster or of any other person who has received traceable proceeds. xxx

18. Taking clue from the judgment above, where the judgment debtor had received the money by fraud then at best he shall be holding the money in constructive trust for the decree holder, even if the fraud had subsequently been committed. Though here the learned counsel for the revenue referred to Section 292(C) of the Income Tax Act, 1961 to take benefit of presumption attached to the amount seized viz:-

292C (1) Where by books of account, other documents, money, bullion, jewellery or other valuable article or thing are or is found in the possession or control of any person in the course of a search under section 132 (or survey under Section 133A), it may, in any proceedings under this Act, be presumed - (i) That such books of account, other documents, money, bullion, jewellery or other valuable article or thing belong or belongs to such person;

But admittedly, presumption as is envisaged in section 292C is a rebuttable one and in this case stood rebutted by the decree in favour of the decree holder which confirmed Rs.1.6 crores was received by the judgment debtor by fraud. Now, here Rule 9 of the Second Schedule of the Income Tax Act would become relevant and it read:

Schedule II Rule 9 General bar to jurisdiction of civil courts, save where fraud alleged. xxx xxx xxx

Provided that a suit may be brought in a civil court in respect of any such question upon the ground of fraud.

19. Rule 9 confirms my view qua a leverage to be given to the plaintiff if he brings a suit on grounds of fraud. This exactly has been the case of the decree holder.

20. I may now refer to Section 226 of the Income Tax Act, 1961 which relate to other modes of recovery. Under Section 226 Rule 4 the assessing officer may apply to the Court in whose custody there is money belonging to the assessee for payment to it of the entire amount of such money or if it is more than the tax amount, an amount sufficient to discharge the tax.

21. The section rather clarifies the money which belong to the assessee shall only be available for payment as tax to the Income Tax Department, but what if money found in possession of the assessee does not belong to him or he is holding such money in trust/constructive or otherwise. To my mind such money

can't be adjusted against tax liability of the assessee.

22. Further the plea of revenue that the decree holder ought to have applied u/s 132(11) per Rakesh Kumar Aggarwal (supra) is also not sustainable, per Section 132(11) stands omitted by the Finance Act of 2002 w.e.f. 01.06.2002 and hence decree holder could not have availed of such provision in any case.

23. Lastly the plea of the Income Tax Department that it being a secured creditor, would not be of any benefit to the revenue in view of the fact the money seized to the extent of decree does not belong to assessee being obtained by fraud as discussed above. The assessee though was in possession of it but at best can said to have held it only in constructive trust.

24. Application is thus dismissed for reasons aforesaid.

25. No order as to cost.

EX.P. 381/2012, EX.APPL.(OS) 66-67/2017

26. List for further proceedings on 15.02.2018.