

(2003) 06 BOM CK 0009

In the Bombay High Court

Case No : Notice of Motion No. 363 of 2003 in Suit No. 429 of 2003 13 June 2003

Videocon International Ltd.

APPELLANT

Vs

Indus Ind Bank Ltd.

RESPONDENT

Date of Decision : 13-06-2003

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 21 Rule 58

Citation : (2003) 131 TAXMAN 460

Hon'ble Judges : S. A. Bodde, J

Bench : Division Bench

Advocate : Janak Dwarkadas and Neeta Rajda, for the Assessee S.H. Doctor, A.S. Doctor, D.R. Mehta, S.R. Rajguru, A.D. Kango and H.D. Rathod, for the Revenue, for the Appellant;

Judgement

By this notice of motion the plaintiffs seek temporary injunction inter alia restraining the 2nd defendant from exercising any right including a right to vote over or in respect of the 10 lakhs shares of Indus Ind Bank held by the 2nd defendant. They also seek an injunction restraining the defendants from exercising any voting right in respect of shares and for direction to them to handover all the benefits arising out of the said shares including a sum of Rs. 1,01,76,820 as dividend. This injunction is sought in this suit in which the plaintiffs have sought a declaration that it is they who are the beneficial owner of the 10 lakhs shares of the Indus Ind Bank described in Exhibit "A" to the plaint and are alone entitled to all the benefits and rights including dividends, etc.

2. The shares have been attached by the defendant No. 3, the Tax Recovery Officer for recovery of dues of Income Tax from monies payable by the defendant No. 2, A.N. Corporation Ltd. to the said defaulter. In the process of recovery, the Tax Recovery Officer has attached shares which are registered in the name of the 2nd defendant, A.N. Corporation Ltd. but which are in possession of the plaintiffs. The character and the capacity in which the plaintiffs hold the shares,

inter alia arises for determination by this notice of motion.

3. The plaintiffs, claiming to be entitled to the beneficial ownership of the shares, objected to the attachment of the shares made by the Tax Recovery Officer. The Tax Recovery Officer by order dated 20-12-2002 held that the plaintiffs are not the legal owner of the shares and the defendant No. 2 is the legal owner. The plaintiffs have thereafter filed this suit. The Tax Recovery Officer has passed the aforesaid order under rule 11 of the Schedule II to the Income Tax Act, 1961. This suit is instituted inter alia against the order of the Tax Recovery Officer which under rule 11(6) is conclusive subject to the result of such suit. The facts in brief are as follows :

4. A company called Devprayag Properties Ltd. is a tax defaulter. The 2nd defendant Company A.N. Corporation, the group company of Devprayag Properties Ltd. appears to be owing monies to Devprayag Properties Ltd. A.N. Corporation is the promoter of the defendant No. 1 Indus Ind Bank Ltd. and holds shares to the extent of 10 lakhs in the bank. These shares are hereinafter referred to as "the shares".

5. Apparently, A.N. Corporation which is a registered owner of the shares has handed over possession of the shares to the plaintiffs, Videocon International Limited sometime in the year 1994 and thereafter while the shares were in possession of the plaintiffs the Tax Recovery Officer attached the shares. Initially on 14-12-1999 the Tax Recovery Officer issued prohibitory order u/s 226(3) of the Income Tax Act against Devprayag Properties Ltd. and called upon the defendant No. 1. Indus Ind Bank to pay any monies which were lying to the credit of the defendant No. 2 by way of dividends with the said bank. Bank replied that Devprayag Properties did not hold any shares and that the 10 lakhs shares had been lodged by the plaintiffs for transfer but they could not be transferred due to a Reserve Bank of India Regulation. The bank forwarded a copy of the notice of the plaintiffs. Thereafter, the plaintiffs demanded that the bank keep the accrued dividend in abeyance since they were the beneficial owners.

6. The plaintiffs thereafter filed a writ petition No. 581 of 2001 against the prohibitory order passed by the Deputy Commissioner. In this writ petition, the plaintiffs claimed release from the attachment of the shares in question on the ground that they were the beneficial owners of the shares and these shares could not be attached for recovery of dues from the defendant No. 2. A Division Bench of this court found that there was serious dispute of facts and therefore directed the Tax Recovery Officer to hear the plaintiffs and the defendant No. 2 and decided the matter in accordance with the law. Detailed submissions were made before the Tax Recovery Officer, who passed the order dated 20-12-2002 holding that the shares in question of Indus Ind Bank Limited belong to the defendant No. 2, A.N. Corporation and not to the plaintiffs. The plaintiffs challenged this order by Writ Petition No. 24 of 2003. This court directed the plaintiffs to file a suit. This is that suit.

7. It is obvious from the facts of this case that the plaintiffs would be entitled to the reliefs claimed by them in respect of the shares, if they can prima facie establish that they have a title to the shares since obviously their shares cannot be attached for the recovery of dues from the defendant No. 2, A.N. Corporation, as dues of Devprayag Properties Ltd. If the plaintiffs cannot prima facie establish title to the shares, it is obvious that they would not be entitled to any relief since then the attachment would be of shares belonging to A.N. Corporation, the defendant No. 2 which owes monies to Devprayag Properties Ltd., the tax defaulter.

8. Mr. Dwarkadas, learned counsel for the plaintiffs, submitted that the plaintiffs are in possession of the shares in question. Those shares were initially delivered to them by the defendants as a pledge for the amount advanced by three other group companies of the plaintiffs i.e. (1) Videocon Narmada Electronics Limited. (2) Videocon Petroleum Limited and (3) Videocon Properties Limited. It is stated that the Videocon Narmada Electronics Limited has now merged with the plaintiffs. According to the plaintiffs its group companies have allegedly advanced amounts to the defendants as follows :

(a) Rs. 1,00,00,000 vide cheque No. 678447, dated 7-4-1994 drawn on Indian Bank, Nariman Point Branch from the plaintiff group company, Videocon Narmada Electronics Ltd.

(b) Three cheques for Rs. 1,00,00,000 each vide cheque Nos. 730306, 730307 and 730308 all dated 15-6-1994 drawn on Indian Bank, Nariman Point Branch from the plaintiff group companies, Videocon Petroleum Ltd.

Out of these amounts, Rs. 2,00,00,000 have been refunded on 8-4-1995.

(c) An amount of Rs. 13 crores was paid on behalf of Megal Homes (P) Ltd., a company belonging to A.N. Properties & Investments Co. (P) Ltd., group at the request of Mr. V.D. Nawani by pay order dated 1-12-1994 from Federal Bank Ltd.

Out of the same Rs. 10 crores was refunded on 22-4-1995 by pay order.

The plaintiffs state that thus the Principal amount outstanding (2 crores Carlton and 3 crores Meghal Homes) aggregated to around Rs. 5 crores. The advances were given at the rate of 18 per cent interest and the interest amount along with the principal amount of Rs. 5 crores remained outstanding.

The plaintiffs thus say that an amount of Rs. 5 crores is outstanding and payable by the defendant No. 2 to the plaintiffs. It must be noted that Exhibit "A" which is a copy of the statement which is supposed to show the detail of the amounts paid by the plaintiffs group companies to A.N. Corporation does not show any amount paid by Videocon Properties Limited. Also the payee is not shown in the Schedule as the defendant No. 2 but is shown to be one Reoshiv, Liquidator, High Court. Apparently, for some reason best known to the plaintiffs, their group companies ie. Videocon Petroleum Ltd. and Videocon Properties which are said to have advanced the loan to Defendant No. 2 are not joined as parties to the suit.

There is also no affidavit filed by them that they advanced a loan as claimed by the plaintiffs. It must be borne in mind that the private limited companies are independent juristic person and either those who advanced loan ought to have been joined as party or the plaintiffs ought to have at least filed affidavits on their behalf that they advanced a loan.

9. The plaintiffs case is that the shares in question were pledged with the plaintiffs in the year 1995. Sometime in November or early December 1995 at a meeting Mr. Nawani acting on behalf of the 2nd defendant and S.K. Sheigikar, acting on behalf of the plaintiffs agreed that the plaintiffs should purchase 10 lakhs shares which were handed over as security to them since the defendant No. 2 were not in a position to pay the said balance amount of the loan received by them. In other words, the amount outstanding and payable to the plaintiffs would be treated as consideration for the shares in question and thus the plaintiffs purchased the shares for a valuable consideration from the Defendant No. 2. At the outset, it must be noted that excepting plaintiffs word, which cannot be accepted as true at this stage, there is no evidence whatsoever that the plaintiffs purchased the shares in question. There is no deed to that effect. There is no proof that the plaintiffs group companies agreed that the amount allegedly recoverable by them from the defendant No. 2 be adjusted as consideration for the purchase of shares. There is no document that the defendants got a valid discharge of the loan which is said to be repayable to the plaintiffs group company by the sale of the shares to the plaintiffs. For all these reasons, prima facie, it appears that the plaintiffs have not proved any consideration for the alleged purchase of shares by them and therefore the transaction of purchase suffers from a want of consideration. Moreover, there is nothing brought on record to show that the defendant, who was the registered holder of the shares agreed or consented that the shares be transferred to the plaintiffs in view of the repayment of the loan to the plaintiffs group companies. Prima facie, therefore, it appears that title in the shares has not been passed to the plaintiffs.

10. Mr. Dwarkadas, the learned counsel for the plaintiffs, relied on Mathalone Vs. Bombay Life Assurance Co. Ltd., and Life Insurance Corporation of India Vs. Escorts Ltd. and Others, , for the statement of law that on the transfer of shares the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. He relied on the observations of the Apex Court in the latter case, which reads as follows:

.... A share is transferable but while a transfer may be effective between transferor and transferee from the date of transfer, the transfer is truly complete and the transferee becomes a shareholder in the true and full sense of the term, with all the rights of a shareholder, only when the transfer is registered in the company's register. A transfer effective between the transferor and the transferee is not effective as against the company and persons without notice of the transfer until the transfer is registered in the company's register. Indeed

until the transfers registered in the books of the company the person whose name is found in the register alone is entitled to receive the dividends, notwithstanding that he has already parted with his interest in the shares. However, on the transfer of shares, the transferee becomes the owner of the beneficial interest though the legal title continues with the transferor. The relationship of trustee and cestui que trust is established and the transferor is bound to comply with all the reasonable directions that the transferee may give. He also becomes a trustee of the dividends as also of the right to vote....

However, in view of my finding above that alleged transaction is without any consideration, the aforesaid observations are of no avail to the plaintiffs.

11. Mr. Dwarkadas, the learned counsel for the plaintiffs, next submitted that the order of the Tax Recovery Officer is without jurisdiction in that the Tax Recovery Officer has held that there is no transfer of beneficial interest in favour of the plaintiffs because no consideration has passed from the plaintiffs to the defendants and that the owner of the shares is the defendant No. 2. According to the learned counsel the Tax Recovery Officer's jurisdiction under Schedule II was limited to inquiring as to who is in possession of the disputed property and not to decide the disputed question and title.

12. The learned counsel relied on a judgment of this court rendered by the Division Bench of this court in Gangaram Ratanlal Vs. Simplex Mills Co. Ltd., . In that case the court considered the question whether a Tax Recovery Officer has power under rule 22 of the IIInd Schedule to declare as void u/s 281, a transfer or property effected by an assessee during the pendency of proceedings against him under the Act on the ground that such transfer was made with the intention to defraud the revenue. That was a case in which the plaintiff was said to have transferred his property during the pendency of proceedings against him. That transfer had been completed in accordance with the law had been set aside by the Tax Recovery Officer under rule 11 on the ground that it was intended to defraud the revenue. Drawing an analogy between order 21 rule 58 of the CPC and rule 11 of the Second Schedule, the Division Bench held that complicated questions of title cannot be gone into under rule 11. The Division Bench observed as follows :

Upon analogy, therefore, it must be said that the Tax Recovery Officer, acting under rule 11 of the Second Schedule, must direct his investigation to possession. It is not open to him to go into complicated questions of title. But, if in the course of such investigation as to who is in possession of the property attached, a question of some legal right, interest or title arises and if it affects the determination of the question as to who is the person really in possession, he can take such right, interest or title into account.

If the contention of Mr. Dwarkadas, the learned counsel for the plaintiffs, is to be accepted, the Tax Recovery Officer was only entitled to see if the plaintiffs were in possession, and having so seen he was bound to accept that the plaintiffs have

a title to those shares. He could not have given any finding on whether any consideration had passed while in the course of the transaction of the alleged purchase. I am of view that this contention cannot be supported on the basis of the decision of the Division Bench. In Gangadhar Vishwanath Ranade's case (supra) the Division Bench itself observed that if in the course of an investigation question of legal right, interest or title arises and it affects the determination of the question, the Tax Recovery Officer certainly can take such legal right, interest or title into account. Therefore, if a person claims to be in possession of shares and also claims that he is in possession as an owner of the shares the Tax Recovery Officer can certainly ask the person for proof of ownership. If, there is none, as prima facie appears to be so, the Tax Recovery Officer can certainly negate the plea of ownership. The Tax Recovery Officer must necessarily be taken to have this power, since in the course of recovery there is every likelihood that a person claims that the property which has been attached, for recovery of dues of the defaulter really belongs to him and not the defaulter. If the plaintiffs contentions were to be accepted, the Tax Recovery Officer would not be entitled to ask the objector for any proof of his ownership and to examine if he has really purchased the property. In fact, as rightly pointed out by Mr. Doctor the judgment of the Division Bench was carried in appeal to the Supreme Court. In The Tax Recovery Officer II, Sadar, Nagpur Vs. Gangadhar Vishwanath Ranade (Dead) Through Mrs. Shobha Ravindra Nemiwant, , the Supreme Court has held the Tax Recovery Officer to be possessed of such power. The Supreme Court observed as follows :

9. The Tax Recovery Officer, therefore, has to examine who is in possession of the property and in what capacity. He can only attach property in possession of the assessee in his own right, or in possession of a tenant or a third party on behalf of /for the benefit of the assessee. He cannot declare any transfer made by the assessee in favour of a third party as void. If the department finds that a property of the assessee is transferred by him to a third party with the intention to defer the revenue, it will have to file a suit under rule 11 (6) to have the transfer declared void u/s 281.

10.... No doubt, it is impossible to separate altogether the question of possession and of title. Thus, if the judgment-debtor was in possession, he may have been in possession as agent or trustee for another; and this has to be enquired into. To that extent title may be a part of the inquiry. Similarly, if the property attached is claimed by a third party who adduces evidence to show that he was possessed of the property under some kind of a title, the property will have to be released from attachment. The procedure is not meant to decide intricate questions of law as to title to the property. Therefore, where a claim is made to the property attached, by some one claiming to be a transferee from the judgment-debtor and the claim is disallowed, the claimant can institute a suit under order XXI, rule 63 to establish his title to the property. In such a suit it would be open to the attaching creditor to plead in defence that the transfer was in fraud of the general body of creditors and was void u/s 53 of the Transfer of

Property Act. Similarly, if the claim of the transferee is allowed, the attaching creditor may sue on behalf of himself and all other creditors u/s 53 of the Transfer of Property Act for a declaration that the transfer was void as it was in fraud of the creditors.

11 When a transfer is real, though it is liable to be impeached as a fraud on creditors, and the transferee has entered into possession, he would succeed in the summary proceedings, with the result that it is the defeated attaching creditor who would have to figure as a plaintiff....

12. In the light of this discussion about the provisions of order XXI, rules 58 to 63, if we examine rule 11 (4) of the Second Schedule to the Income Tax Act, it is clear that the Tax Recovery Officer is required to examine whether the possession of the third party is of a claimant in his own right or in trust for the assessee or on account of the assessee. If he comes to a conclusion that the transferee is in possession in his or her own right, he will have to raise the attachment. If the department desires to have the transaction of transfer declared void u/s 281, the department being in the position of a creditor, will have to file a suit for a declaration that the transaction of transfer is void u/s 281 of the Income Tax Act. (pp. 429-430)

It is, therefore, clear that the question of possession and title being "impossible to separate altogether", the Tax Recovery Officer is entitled to go into the questions of title as a part of enquiry but is not entitled to decide the questions of law as to the title to the property. In the present case, the only thing the Tax Recovery Officer has enquired into is whether the plaintiffs ownership is real in the sense whether the plaintiffs have paid any consideration for the alleged ownership of the shares. Not having found so, the Tax Recovery Officer has denied the plea of ownership. I am of view that the Tax Recovery Officer was entitled to do so.

13. Moreover, the present case must be distinguished on facts from the case of Gangadhar Vishwanath Ranade (supra) where the Tax Recovery Officer had nullified as void a completed transfer made by the assessee. In the present case the Tax Recovery Officer has rejected the plaintiffs claim that it has become the owner on the ground that there is no proof of consideration paid by the plaintiffs. There is thus a material difference between what the Tax Recovery Officer has done in the present case and in Gangadhar Vishwanath Ranade's case. Thus I do not find, as prima facie, that the order of the Tax Recovery is without jurisdiction or that the Tax Recovery Officer has exceeded jurisdiction.

14. For the reasons stated above, I am of view that the plaintiffs have not made out any prima facie case for grant of an injunction as prayed for by them. Prima facie, the defendant No. 2 is the owner of shares in question and though the plaintiffs are in possession of shares there is no proof that they are in possession as owners of the shares or have a title in the shares. This being so, the plaintiffs are, prima facie, not entitled to any injunction as prayed for. Mr. Doctor, the

learned counsel for the defendants also submitted that the alleged transfer of shares by way of sale could not have been legal in view of the Stock Exchange Board of India Guidelines which prohibited the transfer. According to learned counsel since the transfer was in violation of the guidelines the transfer was in violation of the law and must on settled principles of law be held to be void.

15. This submission has been strongly opposed by Mr. Dwarkadas, the learned counsel for the plaintiffs. It is, however, not necessary to go into this question in view of my finding above. The Notice of Motion is accordingly dismissed.

16. At this stage Mr. Dwarkadas, the learned counsel for the plaintiffs, points out that on 4-9-2002 the Division Bench of this court has directed the prohibitory order dated 14-12-1999 to continue to remain in force upto a certain date. But this order has been continued from time to time. This court also continued the order on 31-1-2003. He, therefore, requests for continuation of the said order for a further period of four weeks. Having regard to the circumstances of the case, the said order dated 31-1-2003 shall continue till 14-7-2003.

17. The Notice of Motion is disposed of accordingly. In the circumstances of the case, there shall be no order as to costs.