

CASE NO.:
Appeal (civil) 6316-23 of 2005

PETITIONER:
Tax Recovery Officer, Central Range-1

RESPONDENT:
Custodian the Special Court(T.O.R.T.S) Act, 1992 & ors.

DATE OF JUDGMENT: 17/08/2007

BENCH:
G.P. Mathur & P.K. Balasubramanyan

JUDGMENT:
J U D G M E N T

G.P. Mathur, J.

These appeals have been filed by Tax Recovery Officer, Central Range-1, under Section 10 of the Special Courts (Trial Of Offences Relating To Transactions In Securities) Act, 1992 (hereinafter referred to as the \021Special Courts Act\022) against the order dated 24.2.2005 of the Special Court passed on Intervention Application Nos. 458 to 465 of 2004 in Execution Application Nos. 98 to 105 of 2001 in Miscellaneous Petition Nos. 189/95, 92/96, 102/95, 188/95, 103/95, 251/95 and 252/95.

2. The custodian exercising powers under Section 3(2) of the Special Courts Act published the name of M/s. Dhanraj Mills Pvt. Ltd. in gazette as a notified person. In view of Section 3(3) of the Special Courts Act all the assets belonging to the notified party stands attached to the Special Court. Thus, the assets of M/s. Dhanraj Mills Pvt. Ltd. stood attached to the Special Court. It was found that M/s. Killick Nixon Pvt. Ltd. and its 13 group companies owed substantial amount of money to M/s. Dhanraj Mills Pvt. Ltd. and M/s. Killick Nixon Pvt. Ltd. also stood as guarantor for the repayment of the money. The custodian on behalf of M/s. Dhanraj Mills Pvt. Ltd. filed suits for recovery of its dues against M/s. Killick Nixon Pvt. Ltd. and its 13 group companies. The Special Court passed decrees against M/s. Killick Nixon Pvt. Ltd. and its group companies on 18.9.1997. The custodian then filed Executing Applications bearing Nos. 98 to 105 of 2001 before the Special Court for recovery of the decretal amount on behalf of M/s. Dhanraj Mills Pvt. Ltd. The Special Court on 14.2.2003 appointed a receiver for taking charge of certain assets and properties of M/s. Killick Nixon Pvt. Ltd. and the other group companies which were sufficient to satisfy the entire decretal amount. Subsequently thereto the properties of M/s. Killick Nixon Pvt. Ltd. were put to auction and money was realized. It appears that a certified demand of Rs.25.88 crores against M/s. Killick Nixon Pvt. Ltd. was pending for recovery by the Tax Recovery Officer, Central Range-1, Mumbai. On 25/30.8.2004 the Tax Recovery Officer filed Intervention Application Nos. 450 to 465 of 2004 before the Special Court with a prayer that the custodian be directed to consider the claim of recovery of arrears of income tax from M/s. Killick Nixon Pvt. Ltd. on a priority basis before distribution of sale proceeds to any other creditor. A further prayer was made that the custodian be restrained from distributing the sale proceeds without first satisfying the claim of the income tax department. On 1.9.2004 the Special Court passed an order directing the custodian to submit a report which was complied with by the custodian on

19.6.2004. On 24.11.2004 the Special Court passed an order confirming the sale of the property of M/s. Killick Nixon Pvt. Ltd. to the highest bidder M/s. Gama Constructions for Rs.30 crores. The Intervention Applications filed by the Tax Recovery Officer were, however, rejected by the Special Court on 24.2.2005 by the following order: -

\023By these applications, recovery orders against a third party which is not a notified party, are sought. These applications are not maintainable before this court. Applications disposed of.\024

It is this order which is subject matter of challenge in the present appeal.

3. Before advertng to the submissions made by the learned counsel for the parties it will be convenient to set out the relevant provisions of the Special Courts (Trial Of Offences Relating To Transactions In Securities) Act, 1992 which have a bearing on the controversy in hand. Section 3, sub-sections (1), (2) and (3) of Section 9A, Sections 11 and 13 of the Special Courts Act read as under: -

\0233. Appointment and functions of Custodian. (1) The Central Government may appoint one or more Custodians as it may deem fit for the purposes of this Act.

(2) The Custodian may, on being satisfied on information received that any person has been involved in any offence relating to transactions in securities after the 1st day of April, 1991 and on and before the 6th June, 1992, notify the name of such person in the Official Gazette.

(3) Notwithstanding anything contained in the Code and any other law for the time being in force, on and from the date of notification under sub-section (2), any property, movable or immovable, or both, belonging to any person notified under that sub-section shall stand attached simultaneously with the issue of the notification.

(4) The property attached under sub-section (3) shall be dealt with by the Custodian in such manner as the Special Court may direct.

(5) The Custodian may take assistance of any person while exercising his powers or for discharging his duties under this section and section 4.\024

\0239A. Jurisdiction, powers, authority and procedure of Special Court in civil matters. (1) On and from the commencement of the Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Act, 1994, the Special Court shall exercise all such jurisdiction, powers and authority as were exercisable, immediately before such commencement, by any civil court in relation to any matter or claim-

(a) relating to any property standing attached under sub-section (3) of section 3;

(b) arising out of transactions in securities entered into after the 1st day of April, 1991, and on or before the 6th day of June, 1992, in which a person notified under sub-section (2) of section 3 is involved as a party, broker, intermediary or in any other manner.

(2) Every suit, claim or other legal proceeding (other than an appeal) pending before any court immediately before the commencement of the Special Court (Trial of Offences Relating to Transactions in

Securities) Amendment Act, 1994, being a suit, claim or proceeding, the cause of action whereon it is based is such that it would have been, if it had arisen after such commencement, within the jurisdiction of the Special Court under sub-section (1), shall stand transferred on such commencement to the Special Court and the Special Court may, on receipt of the records of such suit, claim or other legal proceeding proceed to deal with it, so far as may be, in the same manner as a suit, claim or legal proceeding from the stage which was reached before such transfer or from any earlier stage or de novo as the Special Court may deem fit.

(3) On and from the commencement of the Special Court (Trial of Offences Relating to Transactions in Securities) Amendment Act, 1994, no court other than the Special Court shall have, or be entitled to exercise, any jurisdiction, power or authority in relation to any matter or claim referred to in sub-section (1).\024\02311. Discharge of liabilities. (1) Notwithstanding anything contained in the Code and any other law for the time being in force, the Special Court may make such order as it may deem fit directing the Custodian for the disposal of the property under attachment.

(2) The following liabilities shall be paid or discharged in full, as far as may be, in the order as under:-

(a) all revenues, taxes, cesses and rates due from the persons notified by the Custodian under sub-section (2) of section 3 to the Central Government or any State Government or any local authority;

(b) all amounts due from the person so notified by the Custodian to any bank or financial-institution or mutual fund; and

(c) any other liability as may be specified by the Special Court from time to time.\024\02313. Act to have overriding effect - The provisions

of this Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force or in any instrument having effect by virtue of any law, other than this Act, or in any decree or order of any court, tribunal or other authority.\024

Sub-section (2) of Section 3 empowers the custodian, on being satisfied on information received that any person has been involved in any offence relating to transaction in securities after the first day of April, 1991 and on or before 6th June, 1992 to notify the name of such person in the official Gazette. Sub-section (3) of Section 3 provides that on and from the date of notification under sub-section (2), any property, moveable or immovable, or both belonging to any person notified under sub-section (2) shall stand attached simultaneously with the issue of the notification. Sub-section (4) of Section 3 provides that the property attached under sub-section (3) shall be dealt with by the custodian in such manner as the Special Court may direct. Section 9A deals with the jurisdiction, powers, authority and procedure of Special Court in civil matters. Clause (a) of sub-section (1) of Section 9A provides that on and from the commencement of the Special Courts (Trial Of Offences Relating To Transactions In Securities) Amendment Act, 1994, the Special Court shall exercise all such jurisdiction, power and authority as were exercisable immediately before such commencement by any civil court in relation to any matter or claim relating to any property standing attached under sub-section (3) of Section 3. The words \023in relation to any matter or claim\024

occurring at the end of sub-section (1) of Section 9A are important and they clearly indicate that the Special Court shall have power and authority in relation to any matter or claim relating to any property standing attached under sub-section (3) of Section 3. Therefore, the jurisdiction of the Special Court is confined to the property of the notified person which stands attached under sub-section (3) of Section 3 of the Special Courts Act. Sub-section (1) of Section 11 of the Special Courts Act empowers the Special Court to pass such orders as it may deem fit directing the custodian for the disposal of the property under attachment. Sub-section (2) of Section 11 enumerates the liabilities which have to be paid or discharged and also the priority which has to be followed in discharging the liability. Section 13 of the Special Courts Act gives an overriding effect to the Special Courts (Trial Of Offences Relating To Transactions In Securities) Act, 1992.

4. Dr. R.G. Padia, learned senior counsel for the appellant, has submitted that there were dues of the Income Tax Department as against M/s. Killick Nixon Pvt. Ltd. and it was only after issuance of the public notice for auction of the properties that the Income Tax Department came to know of the impending auction of the assets of the assessee company. At the time of the auction notice a certified demand of Rs.25.88 crores was pending for collection by the Tax Recovery Officer. It was under these circumstances that the Tax Recovery Officer filed Intervention Applications before the Special Court praying that the custodian may be restrained from distributing the sale proceeds without first satisfying the claim of the Income Tax Department and that the said claim should be considered on a priority basis. Learned counsel has submitted that even after the sale of the property of M/s. Killick Nixon Pvt. Ltd., until the money had been distributed to the creditors it was the money of M/s. Killick Nixon Pvt. Ltd. and, therefore, under Section 226(4) of the Income Tax Act the Tax Recovery Officer could apply to the Special Court for payment of the money to discharge the income tax liability of M/s. Killick Nixon Pvt. Ltd. In support of this submission Dr. Padia has placed reliance upon several decisions of this Court and notably on Manmohan Lal and others vs. Income-Tax Officer 168 ITR 616, wherein it was held as under: -

\023.....When an assessee is in default, there are two modes of recovery open to an Income-tax Officer. The first mode is provided under section 222 of the Income-tax Act. Under that section when an assessee is in default in making a payment of tax, the Income-tax Officer may forward to the Tax Recovery Officer a certificate specifying the amount of arrears due from the assessee, and on such certificate, the Tax Recovery Officer shall proceed to recover from the assessee the said amount by one or more of the modes set out in section 222. The other modes of recovery are specified in section 226. Sub-section (4) of section 226 provides that the Income-tax Officer may apply to the court in whose custody there is money belonging to the assessee for payment to him of the entire amount of such money, or, if it is more than the tax due an amount sufficient to discharge the tax.

A perusal of these provisions clearly shows that the Tax Recovery Officer has nothing to do with an application under section 226(4) made by the Income-tax Officer to a court in which there is money lying to the credit of the assessee in default. If such an application is made, it is certainly open to the court to determine as to whether there has been a proper notice of demand served on the decree-holder (assessee in default) according to law. It is only after the court is

satisfied of this that the court can proceed to pay over the amount demanded to the Income-tax Officer.

It is settled by authority long accepted that tax can be recovered from an assessee only when it becomes a debt due from him and that it becomes a debt due when a notice of demand calling for payment of the tax has been served on the assessee. If an assessee objects to the recovery proceedings taken under section 226(4) on the ground that there has been no valid service of a notice of demand and that, therefore, no debt is due, the court must decide the objection, and if it upholds the objection, it cannot permit recovery of the tax claimed.\024

The next decision relied upon by Dr. Padia is Lakshman Swarup Om Prakash vs. Union of India 229 ITR 662, wherein it was held that under Section 226(4) of the Income-tax Act the Assessing Officer or the Tax Recovery Officer can move the court having custody of money belonging to the assessee for payment to him of such money for discharging the tax liability of the assessee. What is necessary is that on the date when the application is made the court should have custody of money belonging to the assessee. In that case reference was made to the following observations made in Union of India vs. Somasundaram Mills (P) Ltd. 152 ITR 420: -

\023It is a general principle of law that debts due to the State are entitled to priority over all other debts. If a decree-holder brings a judgment-debtor's property to sale and the sale proceeds are lying in deposit in court, the State may, even without prior attachment, exercise its right to priority by making an application to the executing court for payment of its dues. If, however, the State does not choose to apply to the court for payment of its dues from the amount lying in deposit in the court but allows the amount to be taken away by some other attaching decree-holder, the State cannot thereafter make an application for payment of its dues from the sale proceeds, since there is no amount left with the court to be paid to the State.....\024

Learned senior counsel has also referred to decision of this Court in Dena Bank vs. Bhikhabhai Prabhudas Parekh and Co. 247 ITR 165, wherein it was held that the State of Karnataka had a preferential claim to recover arrears of sales tax including penalty from a firm over that of the appellant bank in relation to debts due to the bank from the firm for the payment of which the partners of the firm had mortgaged properties belonging to them, and the High Court was right in directing that, even though the bank had obtained a decree (in 1992) and was authorized to bring the mortgaged property to sale, the arrears due to the State had to be paid to the State first and only thereafter the bank could adjust the remaining amount towards the amount due to it under the decree.

5. Learned counsel has thus submitted that it is a settled proposition of law that if money is realized by sale of the properties of the judgment-debtor in execution of the decrees obtained by the decree-holders, until the money is actually paid over to the decree-holders it is the property of the judgment-debtor and the Income Tax Department will have a priority to recover its dues from the judgment-debtor out of the money so realized. According to learned senior counsel the Intervention Applications moved by the Tax Recovery Officer should, therefore, have been entertained by the Special Court as the Income Tax Department had a certified demand against M/s. Killick Nixon Pvt. Ltd. and the money realized by auction of its property was still lying with the Special Court and had not been distributed to the custodian or anybody else. The summary rejection of the Intervention Applications by

the Special Court, it is urged, is wholly illegal.

6. Shri Subramonium Prasad, learned counsel for the custodian, has, on the other hand, submitted that it was M/s. Dhanraj Mills Pvt. Ltd. which had been notified as a party under sub-section (2) of Section 3 of the Special Courts Act and the property, both moveable and immovable, or both of the notified party stood attached simultaneously with the issue of the notification under sub-section (2) of Section 3 of the Special Courts Act. Thus the attached property also became property of the notified party. M/s. Killick Nixon Pvt. Ltd. had not been notified as a party under sub-section (2) of Section 3 of the Special Courts Act. The money realized by the auction sale of the property of M/s. Killick Nixon Pvt. Ltd. in the execution proceedings initiated after decrees had been passed in favour of M/s. Dhanraj Mills Pvt. Ltd. was the property of the notified party, viz., M/s. Dhanraj Mills Pvt. Ltd. and as such the Income Tax Department could not claim any right under Section 226(4) of the Income-tax Act to recover its income tax dues from M/s. Killick Nixon Pvt. Ltd. out of the money so realized. Learned counsel has further submitted that Section 11 of the Special Courts Act lays down the manner in which the liabilities of the notified party has to be discharged and under clause (a) of sub-section (2) thereof all taxes due from the notified party to the Government have to be discharged first. Learned counsel has also submitted that in view of Section 13, the Special Courts Act shall have an overriding effect over the provisions of the Income-tax Act. Learned counsel has referred to the decision of this Court in *Solidaire India Ltd. vs. Fairgrowth Financial Services Ltd.* (2001) 3 SCC 71, wherein it was observed as under at page 74 of the reports: -

\023Under Section 3 of the 1992 Act, all property of notified persons is to stand attached. Under Section 3(4), it is only the Special Court which can give directions to the Custodian in respect of property of the notified party. Similarly, under Section 11(1), the Special Court can give directions regarding property of a notified party. Under Section 11(2), the Special Court is to distribute the assets of the notified party in the manner set out thereunder. Monies payable to the notified parties are assets of the notified party and are, therefore, assets which stand attached. These are assets which have to be collected by the Special Court for the purposes of distribution under Section 11(2). The distribution can only take place provided the assets are first collected. The whole aim of these provisions is to ensure that monies which are siphoned off from banks and financial institutions into private pockets are returned to the banks and financial institutions. The time and manner of distribution is to be decided by the Special Court only.....\024

7. The language employed in Section 13 of the Special Courts Act is clear and explicit when it says that the provisions of the Act shall have effect notwithstanding anything inconsistent therewith contained in any other law for the time being in force. Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 also contains a similar clause that the provisions of the said Act and of any rules or schemes made thereunder shall have effect notwithstanding anything inconsistent therewith contained in any other law except the provisions of the Foreign Exchange Regulation Act, 1973 and the Urban Land (Ceiling and Regulation) Act, 1976. In *Solidair India Ltd.* (supra) the provisions of Section 13 of the Special Courts (Trial Of Offences Relating To Transactions In Securities) Act, 1992 and Section 32 of the Sick Industrial Companies (Special Provisions) Act, 1985 were examined and it was held that both these Acts are special Acts and

in such an event it is the later Act, namely, the Special Courts (Trial Of Offences Relating To Transactions In Securities) Act, 1992 which must prevail. Thus there can be no manner of doubt that the provisions of the Special Courts Act, wherever they are applicable, shall prevail over the provisions of the Income-tax Act.

8. In view of Section 9A of the Special Courts Act the jurisdiction of the Special Court is in relation to any matter or claim relating to any property standing attached under sub-section (3) of Section 3 of the Special Courts Act. What is attached under sub-section (3) of Section 3 of the Special Courts Act is the property, moveable or immoveable, or both belonging to any person notified under sub-section (2) of Section 3 of the Special Courts Act. As already mentioned it was M/s. Dhanraj Mills Pvt. Ltd. which had been notified as a party under sub-section (2) of Section 3 of the Special Courts Act and not M/s. Killick Nixon Pvt. Ltd. M/s. Killick Nixon Pvt. Ltd. had not been notified as a party. M/s. Dhanraj Mills Pvt. Ltd. owed money from M/s Killick Nixon Pvt. Ltd. and its 9 subsidiary companies of which the former stood as guarantor and it was in execution of the decrees passed in favour of M/s. Dhanraj Mills Pvt. Ltd. that the property of M/s. Killick Nixon Pvt. Ltd. was put to auction. Thus the Special Court could not have entertained the application moved by the Income Tax Department under Section 226(4) of the Income Tax Act for realization of its income tax dues from M/s. Killick Nixon Pvt. Ltd. The application moved by the Income Tax Department was, therefore, rightly rejected by the Special Court.

9. Learned counsel for the appellant has also submitted that having regard to Section 10 of the Special Courts Act which provides appeal against the order of the Special Court to this Court both on facts and law, the Special Courts ought to have examined the matter in detail and has erred in rejecting the Intervention Applications by passing a short and cryptic order of 4 or 5 lines. In our opinion, the Special Court having noted the relevant legal provision for rejecting the applications, no exception can be taken to the order passed by it. At any rate we have examined the matter on merits and have arrived at a conclusion that the Intervention Applications were not maintainable before the Special Court.

10. For the reasons discussed above there is no merit in these appeals, which are hereby dismissed.

11. No costs.