

CASE NO.:
Appeal (civil) 166 of 1994

PETITIONER:
Canbank Financial Services

RESPONDENT:
Custodian & Anr.

DATE OF JUDGMENT: 12/04/2004

BENCH:
S. RAJENDRA BABU, DR. AR. LAKSHMANAN & G.P. MATHUR.

JUDGMENT:
J U D G M E N T

RAJENDRA BABU, J. :

Facts leading to this Appeal are as follows:

Appellant engaged Respondent No. 2 as a broker to sell 10,00,000 shares of Reliance Petro Chemicals Ltd. at the rate of Rs. 29/- per share. It is said that those shares were sold and the Respondent No.2 is liable to collect the sale proceeds and pay the same to Appellant. The payment was, however, not made. In the meanwhile, Custodian appointed under section 3 of Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992 (the Act) notified Respondent No.2, whereby all properties belonging to him stood attached. Appellant filed a Petition before the Special Court for a declaration that the sum of Rs. 2.90 crores received by Respondent No 2 on behalf of Appellant was not property 'belonging to' him and hence the attachment of that amount is void. There was also a plea to release the said sum in favour of the Appellant.

Special Court dismissed these prayers vide its Order dated 14 September 1993. Dismissal was on the reasoning that the Appellants failed to show that the money was credited into or lying in any particular account. The Special Court further held that all that the Appellant entitled is only to a charge on the estate of the Respondent No.2 for recovery of their money. But refused to release the money to Appellant. This Order is impugned herein. It is also the case of Respondent No.2 that the Appellant is liable to pay about Rs. 3 crores to his brother and that he is entitled to set off the sum of Rs. 2.90 crores against the amount due to his brother \026 Harshad Metha.

Case put forwarded by the Appellant is; that the Respondent No.2 merely acted as agent / broker on behalf of the Appellant; that the amounts he received from the sale of their shares should have been handed over to them; that as long as the amounts are not handed over, the Respondent No.2 holds the same in trust for and on behalf of the Appellant; that the same is not

his property; that the Respondent No.1 / Custodian ought not to have attached the property since it is not property 'belonging to' Respondent No.2.

Respondent No.2 has not denied the transaction.

In this context the position of law that needs to be ascertained is whether the amount Respondent No.2 is holding belongs to him or not. Under section 11(1) of the Act, the Special Court is empowered to direct Custodian for the disposal of property under attachment. In *Harshad S. Metha v. Custodian and Others* (1998) 5 SCC 1 this Court clarified that if any person other than the notified person has any interest, share, title or right in the attached property it cannot be extinguished. It was clarified that the Special Court cannot dispose of property, which does not belong to notified person.

In this case, it is the admitted position that the Respondent No.2 was asked to sell shares for and on behalf of Appellant. Thus the proceeds of such sale cannot be treated as property belonging to him. It belongs to Appellant and Respondent No.2 was only holding the same in trust. The relationship between a share broker and customer is one of trust. In this view of the matter, the attachment under Section 3 of the Act cannot extend to Appellant's money (Rs. 2.90 crores) and, therefore, appellant is entitled to get back his money.

In order to locate the money that belongs to Appellant, this Court found it essential that more facts in relation to the sale proceeds and the alleged claims of setoff needs to be ascertained. An Order was passed on 6 February, 2001 by this Court wherein Respondent No.2 was directed to file an affidavit disclosing the following facts: -

- a. The dates on which and the parties to whom the said 10-lakh shares were allegedly sold;
- b. The manner in and the date on which the price of the said shares was realized;
- c. The manner in which he dealt with the proceeds stated to have been realized from the sale of those shares;
- d. The account particulars (in so far as it is relevant) of the bank in which the proceeds, if any, of the sale of the said shares were deposited; and
- e. In case any payment had been received by way of settlement or adjustment of any other transaction, then the full particulars of the parties with whom those transactions were held and the particulars of those transaction.

His brother was also directed to file an affidavit clarifying his position on the claim of set off. In order to ascertain the particulars, Respondent No. 2 and his brother were given

liberty to verify the documents and records in the custody of CBI or income tax authorities concerning the said transaction.

Pursuant to this Order Respondent No.2 filed an affidavit; along with he attached a contract note dated 3 March, 1992 indicating that 10 lakh shares of Reliance Petro was sold to Harshad Metha at the rate of Rs. 29/- per share. By this he answers first point.

Though sufficient time and liberty to verify relevant records was given, he failed to answer queries (b) to (e) on one ground or another not tenable in law and hence adverse inference has to be drawn against him. On August 6, 2001 brother of Respondent No.2 Harshad Metha filed an affidavit stating that he is not claiming any set off against Appellant regarding his claims.

Even in Reply to the application filed by the Appellant before the Special Court Respondent No.2 submitted as follows:

"\005I say that it is correct that some time in March 1992, my firm had been approached by the Petitioner herein for sale of 10 lacs shares of Reliance Petrochemicals Ltd. I recollect that the transaction of sale had taken place on behalf of the Petitioner some time in March/April 1992. I understand that the sale proceeds in respect of these transaction have also been received by my firm. I cannot say precisely when the moneys have been received. It is also correct that moneys have yet not been paid over by my firm to the Petitioners herein. I say that there was a balance in the firm's account in excess of Rs. 2.90 crores when the account was frozen by CBI\005"

Considering the categorical admission by the Respondent No.2 that he received money on behalf of Appellant, the Appellant is entitled to get back his money, because the Respondent No.2 is holding the money in Trust. Even if the Respondent No.2 blended the property / money with that of his own money under section 66 of the Indian Trusts Act, 1882 (the Trusts Act) the Appellant is entitled to a charge on the whole fund for the amount due. Therefore we cannot agree with the finding of the Special Court that burdened the Appellant to locate the particular account in which the money is credited so as to claim it back. Section 66 of the Trusts Act arms the Court to impose a charge on the whole property of the trustee to the extent of amount due.

In result, we cannot sustain the view adopted by the Special Court on the application of Appellant for releasing its money. The Appellant is entitled to the amount to the extent of Rs. 2.90 crores out of the assets of Respondent No.2.

Hence, we allow this appeal, set aside the order of Special Court with direction to work out appropriate modalities for refund of the amount due to appellants at an appropriate stage.

JUDIS