2024 INSC 170

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S).4577 OF 2011

SUMAN L. SHAH ....APPELLANT(S)

VERSUS

THE CUSTODIAN & ORS. .....RESPONDENT(S)

WITH

CIVIL APPEAL NO(S).4583 OF 2011

J U D G M E N T

Mehta, J.

1. The factual and legal issues involved in these appeals are common and hence the same have been heard together and are being decided by this common judgment.

2. The instant appeals under Section 10 of the Special Court (Trial of Offences relating to transactions in Securities) Act, 1992 (hereinafter being referred to as the 'Act of 1992') arise out of the final judgments passed by the Special Court, Bombay constituted

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under the Act of 1992 of even date i.e. 11th March, 2011, in MA Nos. 162 and 184 of 2008 in MA No.343 of 1994 in MA No. 193 of 1993.

3. Before proceeding to consider the appeals on merits, it would be apposite to consider the broad scheme of the Act of 1992.

4. The Act was promulgated as large-scale irregularities committed by some share brokers in collusion with the employees of Banks and Financial Institutions(in short 'FIs') came to light in relation to transaction in Government/other securities leading to diversion of funds from the banks/FIs to the individual accounts of certain brokers.

5. The Act provided a mechanism to deal with the above situations and in particular, to ensure speedy recovery of the huge amounts illegally diverted, punish the guilty and restore the confidence of public at large in the security transactions and also to uphold and maintain the basic integrity and credibility of banks and FIs. The period of transactions in securities under the purview was from 1st April, 1991 to 6th June, 1992. A Special Court headed by a sitting Judge of the High Court was established for speedy trial of offences relating to transactions in securities and disposal of properties attached. The Act also provided for appointment of

one or more custodians under Section 3 so as to attach the property/properties of the offenders with a view to preventing diversion of such properties by the offenders.

6. Section 3(2) stipulates that the Custodian may, on being satisfied on information received that any person has been found involved in any offence relating to transactions in securities after 1st April, 1991 and on or before 6th June, 1992, notify the name of such person in Official Gazette.

7. Section 3(3) provides that any property, movable or immovable or both, belonging to the notified persons would stand attached simultaneously with the date of issuance of the notification.

8. Section 3(4) mandates the Custodian to deal with the attached properties in such manner as the Special Court may direct.

9. Section 11(1) empowers the Special Court to pass appropriate order(s) directing the Custodian for disposal of the attached property.

10. Under Section 11(2), liabilities of notified persons are required to be paid or discharged in full by distributing monies so realized after disposal of the attached assets.

11. Having taken into account the relevant provisions of the statute, the brief facts arising for consideration in the present appeals may be noted as below:-

(i) On 2nd July, 1992, Fairgrowth Financial Services Limited (hereinafter being referred to as the 'FFSL') was notified under Section 3(2) of the Act and all its properties stood attached. In 1993, the Custodian filed Miscellaneous Application No. 193 of 93 in the Special Court for the recovery of various sums of money belonging to FFSL from respondent No. 2-Pallav Sheth.

(ii) The Special Court passed a consent decree on 24th February, 1994 directing respondent No. 2-Pallav Sheth to pay a sum of Rs.51,49,07,417.92/- to the Custodian on behalf of FFSL. Respondent No. 2-Pallav Sheth committed default and as a consequence, the Custodian initiated attachment of his assets to recover the decretal amount.

(iii) During the years 1996-1997, the appellant-Suman L. Shah had borrowed a sum of Rs.50 lakhs from respondent

No. 6-Klar Chemicals(P) Ltd. and a sum of Rs. 25 lakhs from respondent No. 7-Malika Foods (P) Ltd. (original respondent Nos. 5 and 6 before the Special Court) whereas appellant-Laxmichand Shah had borrowed Rs.45 lakhs from respondent No. 8-Jainam Securities(P) Ltd. (original respondent No.7 before the Special Court). As per the case set up by the Custodian before the Special Court, these were the benami companies of respondent No. 2-Pallav Sheth who had illegally parked the tainted money received from FFSL, the notified company in these benami companies (respondent Nos.6, 7 and 8) created by himself.

(iv) The Custodian notified respondent No.2-Pallav Sheth under Section 3(2) of the Act on 6th October, 2001. He was declared insolvent on 5th November, 2003 and as a consequence, all his assets and properties got vested in the Official Assignee i.e. respondent No.9 herein. As respondent No. 2-Pallav Sheth failed to pay the decretal amount, the Custodian sought information from respondent No. 3-Income Tax Department regarding the assets of respondent No. 2-Pallav Sheth. In turn, the Income Tax Department, vide letter dated 5th May, 1998 informed the Custodian

about respondent No. 2-Pallav Sheth being the benami owner of the companies (respondent Nos. 4 to 8 herein).

(v) The Special Court, by an order passed in miscellaneous application registered for initiating contempt proceedings against respondent No. 2-Pallav Sheth observed that respondent Nos. 4 to 8 were benami companies of respondent No.2-Pallav Sheth.

12. The Custodian claims to have acquired knowledge/information that the appellant Suman L. Shah had received an amount of Rs. 50 lakhs from respondent No. 6(out of which Rs. 25 lakhs were repaid by cheque and the entry dated 5th May, 1997 is available in the passbook) and Rs. 25 lakhs from respondent No.7 and that the appellant-Laxmichand Shah had received an amount of Rs.25 lakhs from respondent No.8.

13. Accordingly, Miscellaneous Application Nos. 162 of 2008 and 184 of 2008 were filed by the Custodian before the Special Court for recovery of Rs. Rs. 50 lakhs from the appellant Suman L. Shah (Civil Appeal No.4577 of 2011) and for recovery of Rs. 25 lakhs from the appellant/Laxmichand Shah (Civil Appeal No. 4583 of 2011), both being garnishees of respondent No. 2-Pallav Sheth i.e. the owner of the benami companies (respondent Nos.4 to 8).

14. The Special Court, vide judgment dated 11th March, 2011 passed in Miscellaneous Application No. 162 of 2008 directed the appellant Suman L. Shah to pay a sum of Rs. 50 lakhs(Rs. 25 lakhs each due to respondent Nos. 6 and 7) being benami companies of respondent No. 2-Pallav Sheth, to the Custodian with interest @ 12% per annum from 1st April, 1997 till realisation of the amount.

15. Vide another judgment of even date passed in Miscellaneous Application No. 184 of 2008, the Special Court directed appellant-Laxmichand Shah to pay a sum of Rs. 25 lakhs due to respondent No. 8, benami company of respondent No. 2-Pallav Sheth, to the Custodian with interest @ 12% per annum from 1st April, 1997 till realisation of the amount.

16. The Special Court further directed that the appellants shall deposit the amounts with the Custodian within a period of two months from the date of the judgment failing which the Custodian would be free to execute the orders as decrees of the Civil Court. Upon recovery, the amounts were directed to be paid to respondent No. 9-Official Assignee whereafter the appellants would stand discharged of their liabilities towards the benami companies of respondent No.2 Pallav Sheth.

17. Aggrieved by the judgments dated 11th March, 2011, Suman L. Shah and Laxmichand Shah have instituted Civil Appeal Nos. 4577 of 2011 and 4583 of 2011 before this Court.

18. While entertaining the appeals, vide order dated 13th May, 2011, this Court directed appellant-Suman L. Shah to deposit Rs.50 lakhs and appellant-Laxmichand Shah to deposit Rs. 25 lakhs with the Officer on Special Duty attached with the Special Court and to furnish a bank guarantee to the Custodian towards the balance amount, i.e., interest.

19. Both the appeals were dismissed by this Court vide order dated 23rd April, 2012 on account of non-compliance of the order dated 13th May, 2011.

20. The IAs seeking restoration of these Civil Appeals were accepted vide order dated 14th March, 2014, subject to deposit of a total sum to the tune of Rs. 2.20 crores by the appellants with the Officer on Special Duty, Special Court. The amount has been deposited and accordingly the appeals were taken on board.

21. Learned counsel representing the appellants contended that the Special Court committed manifest error in facts as well as in law in holding that the appellants herein were the garnishees of

respondent No. 2-Pallav Sheth. It was contended that the questionable transactions between the appellants and respondent Nos. 6, 7 and 8, the alleged benami companies of respondent No. 2-Pallav Sheth (notified party) and judgment debtor of FFSL(notified party) were 13-14 years old and as no documentary proof relating to these transactions was provided by the Custodian on the record of the proceedings before the Special Court, the statement of appellants that the entire amounts of loan taken from respondent Nos. 6, 7 and 8 were repaid ought not to have been brushed aside.

22. It was contended that the appellants herein had taken the loans from respondent Nos. 6, 7 and 8 in the years 1996-1997, i.e., long before respondent No. 2-Pallav Sheth came to be notified under Section 3(2) of the Act of 1992, i.e., 6th October, 2001 and thus, the burden of proof regarding the existence of liability could not have been shifted on to the appellants and the onus essentially lay upon the Custodian to prove that these amounts had not been repaid and were still recoverable.

23. It was contended that the specific assertion made by the appellants in their deposition affidavits that the amounts in question borrowed from respondent Nos. 6, 7 and 8 had been

repaid partly by cheque and partly by material supplied to these respondents could not be unsettled by the Custodian in cross-examination. Only a bald suggestion was given to the appellants in cross-examination that they did not have any document in the form of vouchers, receipts, invoices or entries in the book accounts to show the adjustment of the remaining amount.

24. It was urged that the letter dated 5th May, 1998 issued by respondent No. 3-Income Tax Department was referred to in the cross-examination of the appellants. However, the said letter was not proved by exhibiting the same in the proceeding before the Special Court. Learned counsel urged that the since the Custodian failed to bring the letter of the Income Tax Department on record, either by summoning the income tax officials or by producing any other admissible evidence, the Special Court committed a grave error on placing implicit reliance on such communication.

25. It was contended that the appellants herein being respondent Nos. 8 before the Special Court were not cross-examined either by respondent No. 2-Pallav Sheth or on behalf of the benami companies i.e. respondent Nos. 6, 7 and 8 and thus it could not be

said with any degree of certainty that the amounts borrowed remained unpaid.

26. The pertinent assertion of learned counsel for the appellants was that since the appellants were never notified under the Act of 1992, the burden of proof could not have been shifted upon them so as to require them to disprove the case set up by the Custodian in the applications for recovery. In this regard, learned counsel for the appellants referred to the following observations made by the Special Court in the impugned order:-

> **"7**. It is true that oral evidence cannot be ignored, but at the same time, it has to be borne in mind that the Official Assignee - respondent No.9 has to recover the properties and assets of respondent No.1 for satisfaction of the decree against him. For the reasons best known to respondent No.1 or respondent Nos. 5 and 6, neither they filed any reply nor cross-examined respondent No.8. At the same time, it cannot be forgotten that the respondent No.8 is a businessman and he was expected to maintain accounts of his business. It is impossible to believe that he would not have maintained accounts of his business. According to him, he had partly repaid these amounts to respondent Nos. 5 and 6 by cheques and partly the amounts were adjusted against the purchases made by respondent Nos. 5 and 6 from Shree Jalaram Timber Depot Pvt. Ltd. He has shown payment of Rs.25 lakh by cheque to respondent No.5 and that is reflected in his passbook. Whenever any payment is made by cheque and the cheque is encashed, naturally the debit entry is taken in the account of the person, who has issued the cheque. For a moment, if it is believed that other documents were not available, at least respondent No.8 could produce the passbook of his account showing the debit entries indicating payment by cheque to respondent Nos. 5 and 6. However, respondent No.8 did not produce any such passbook to show that certain payments were made by cheque and those cheques were encashed and the amounts were debited in his

> account. If Shree Jalaram Timber Depot Pvt. Ltd belonging to respondent No.8 had supplied certain material to respondents Nos. 5 and 6 and that amount was adjusted against the dues payable to respondents Nos. 5 and 6, there must have been some documents in the form of bill books, vouchers, receipts, entries in the account books. However, no such document was produced. It is true that respondent No.8 was not cross-examined by respondent No.1 or respondent Nos.5 and 6. Still, it is to be noted that best evidence in the form of documentary evidence was available with the respondent No.8, but he chose not to produce the best evidence and relied only on his oral testimony. Even though respondent No.8 contended that the documents are not traceable he has nowhere stated that the records were lost or destroyed. There is no satisfactory clarification as to why the records are not traceable. When the best evidence, which is expected to be available with him, has not been produced, the Court may draw an inference that if such record would be produced, it would go against his claim. Therefore, his contention that the amount of Rs.25 lakh each payable to respondent Nos. 5 and 6 has been actually repaid partly by cheque and partly by adjustment of the price of material supplied to them cannot be accepted. Therefore, I hold that the respondent No.8 is liable to pay amount of Rs.25 lakh to respondent No.5 and Rs.25 lakh to respondent No.6.

27. It was fervently contended by learned counsel for the appellants that the impugned judgments do not stand to scrutiny inasmuch as the onus of proof has been shifted on to the appellants without any justification and contrary to the principles enshrined in the Indian Evidence Act, 1872(hereinafter being referred to as the 'Evidence Act'). He thus, implored the Court to accept the appeals and set aside the judgments passed by the Special Court.

28. *Per contra*, learned counsel for the respondents submitted that the bald statements of the appellants herein in their affidavits that the amount borrowed from respondent Nos. 6, 7 and 8 i.e. the benami companies of the notified person i.e. respondent No.2-Pallav Sheth had been returned by way of adjustment towards material supplied was rightly discarded by the Special Court because such statements were not supported by any tangible proof, either oral or documentary. He urged that the appellants claim to be reputed businessmen and thus, it is wholly unbelievable that accounts of business had not been maintained by them so as to substantiate the plea of repayment being made to respondent Nos. 6, 7 and 8 by way of adjustment of material supplied. He thus, implored the Court to affirm the impugned judgments and dismiss the instant appeals.

29. We have given our anxious consideration to the submissions advanced at the bar and have perused the material available on record.

30. For adjudicating the issues raised in these appeals, few admitted facts need to be noted. The miscellaneous applications were filed by the respondent-Custodian in the year 2008 seeking to recover the amounts of Rs.50 lakhs from appellant Suman L.

Shah towards the dues of respondent Nos. 6 and 7 and amount of Rs.25 lakhs from appellant Laxmichand Shah towards the dues of respondent No.8. The respondent Nos.6, 7 and 8 are alleged to be the benami companies of the respondent No. 2-Pallav Sheth.

31. Respondent No. 2-Pallav Sheth is the judgment debtor of FFSL which was a company notified under the provisions of the Act of 1992. Respondent No. 2-Pallav Sheth was notified under the Act of 1992 on 6th October, 2001 and thus, by virtue of Section 3(3) of the Act of 1992, all properties belonging to him stood automatically attached from the date of such notification. The appellants herein had borrowed the amounts in question from respondent Nos. 6, 7 and 8, way back in the years 1996-1997. By that date, there could not have existed any justifiable reason for the appellants herein to have entertained a belief that these were the benami companies of respondent No. 2-Pallav Sheth or that there was any breach of the provisions of the Act of 1992 by Pallav Sheth or the respondent companies.

32. Even if it is assumed for the sake of arguments that respondent Nos. 4 to 8 were the benami companies of respondent No. 2-Pallav Sheth, he not having been notified under the Act of 1992 by the time the amounts were borrowed, the appellants could

not be expected to entertain any doubt regarding the operation of the Act of 1992 either against these companies or even against respondent No. 2-Pallav Sheth or that the companies were the benami companies of Pallav Sheth.

33. The foundation behind the assertion made by the Custodian that the appellants herein were garnishees of respondent No. 2-Pallav Sheth through respondent Nos. 6, 7 and 8 is based entirely on a communication dated 5th May, 1998 purportedly issued by the Income Tax Department. An affidavit was filed on behalf of the Department in the proceedings before the Special Court but in such affidavit, there is no reference whatsoever to the outstanding dues of respondent Nos. 6, 7 and 8 or that the appellants were its debtors. Furthermore, there is no reference whatsoever in this affidavit with regard to letter dated 5th May, 1998 which was annexed with the affidavit filed on behalf of the Custodian and was heavily relied upon by the Special Court. No witness from the Income Tax Department was examined in evidence before the Special Court in miscellaneous applications for recovery.

34. While initiating recoveries, the Custodian relied upon the provisions of Sections 3 and 9A of the Act of 1992 which are reproduced hereinbelow:-

"**3**. 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 insecurities 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.

9A. 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 (24 of 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 (24 of 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 (24 of 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).

(4) While dealing with cases relating to any matter or claim under this section, the Special Court shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908), but shall be guided by the principles of natural justice, and subject to the other provisions of this Act and of any rules, the Special Court shall have power to regulate its own procedure.

(5) Without prejudice to the other powers conferred under this Act, the Special Court shall have, for the purposes of discharging its functions under this section, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely: —

> (a) summoning and enforcing the attendance of any person and examining him on oath;

> (b) requiring the discovery and production of documents;
>
> (c) receiving evidence on affidavits;
>
> (d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 (1 of 1872), requisitioning any public record or document or copy of such record or document from any office;
>
> (e) issuing commissions for the examination of witnesses or documents;
>
> (f) reviewing its decisions;
>
> (g) dismissing a case for default or deciding it ex parte;
>
> (h) setting aside any order of dismissal of any case for default or any order passed by it ex parte; and
>
> (i) any other matter which may be prescribed by the Central Government under sub-section (1) of section 14."

35. From a bare perusal of these provisions, it would become clear that the properties of the person notified under Section 3(2) would stand attached automatically with effect from the date of notification by virtue of Section 3(3). Since respondent No.2-Pallav Sheth was notified (as being a debtor of the originally notified company FFSL) with effect from 6th October, 2001, *a fortiori*, his properties would be deemed to be attached with effect from that date and not prior thereto.

36. The appellants herein took a pertinent plea before the Special Court that the dues towards respondent Nos. 6, 7 and 8, generated

from borrowings made in the years 1996-1997 stood repaid and closed because the amounts had been repaid by cheque(s) and by way of adjustments towards materials supplied. The applications for recovery having been filed by the Custodian with the allegation that the appellants herein were the debtors of the benami companies of the notified person, the primary onus of proving this assertion would be on the Custodian by virtue of Section 101 of Evidence Act. It is only after the Custodian discharged this primary burden and established the existence of the debt, then by virtue of Section 102 of the Evidence Act, perhaps, the onus could be shifted on to the appellants to rebut the same.

37. The entire case of the Custodian regarding subsisting debts of the appellant towards respondent Nos. 6, 7 and 8 was based on a communication received from the Income Tax Department. The appropriate witness to prove such communication would be the official concerned from the Income Tax Department. However, as has been mentioned above, no witness from the Income Tax Department was examined in support of the recovery application. Even the communication forwarded by the Income Tax Department and relied upon by the Custodian was not proved by proper evidence.

38. The appellants herein took a categoric stand in their depositions that they had returned the amounts borrowed from respondent Nos. 6, 7 and 8, but the books of accounts were not available because of lapse of time. The said plea of the appellants herein could not be treated as unnatural or an afterthought because once the transactions were completed and the loans were repaid, there was no reason for the appellants to have entertained a belief that after a period of about 13 years, they would be required to present the account books pertaining to transactions. It was neither a requirement in law nor could it be expected from the appellants herein to retain the books of accounts after more than a decade of the alleged suspicious transactions.

39. Resultantly, the conclusions drawn and the findings recorded in the impugned judgments passed by the Special Court that the appellants herein failed to prove the fact that the amounts had been repaid to the benami companies of the notified person, namely, Pallav Sheth do not stand to scrutiny and cannot be sustained as being contrary to facts and law.

40. As an upshot of the above discussion, the impugned judgments are hereby quashed and set aside.

41. The appeals are allowed accordingly.

42. The amounts deposited by the appellants in furtherance of the order dated 14th March, 2014 shall be reimbursed to them forthwith.

43. Pending application(s), if any, shall stand disposed of.

.....J.
(PAMIDIGHANTAM SRI NARASIMHA)

.....J.
(SANDEEP MEHTA)

New Delhi;
March 05, 2024.