[Reserved]
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Civil Misc. Writ Petition No. 1654 of 2006

Gopal Das Khandelwal and others Petitioners

Vs.

Union of India and others Respondents

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Hon'ble Rajes Kumar, J.
Hon'ble Pankaj Mithal, J

All the five petitioners of this writ petition are related to one another.

A search and seizure under Section 132 of the Income Tax Act, 1961 (hereinafter referred to as an Act) was conducted on 9.5.2003 and 24.5.2003 on the business and the residential premises of respondent no. 5 Purshottam Das Khandelwal who happened to be the proprietor of the firm M/S Suraj Bhan Purshottam Das engaged in money lending business. During the aforesaid search jewellery worth Rs. 34.33 lakhs was seized. Respondent no. 5 on 16.9.2003 applied for release of the aforesaid seized jewellery on the ground that the same belonged to third parties and was in custody of the firm as pawned articles. The Commissioner of Income Tax (Central) Kanpur vide order dated 7.11.2003 directed the assessing authority to release the same on Bank Guarantee of Rs. 34,00,000/- for a period of one year subject to renewal. Respondent no.5 offered certain fixed deposits of the petitioners which were with the respondent no. 4, as security for furnishing Bank Guarantee. Respondent no. 4 Bank on the basis of the aforesaid fixed deposits belonging to the petitioners executed a deed of guarantee on 22.11.2003 in favour of the Commissioner of Income Tax (Central) Kanpur for an amount not exceeding Rs. 34,00,000/- for a period of one year only expiring on 21.11.2004 in respect of liability of direct tax arising out of relevant assessment proceedings concerning block

assessment only. The period of the aforesaid guarantee was extended by one another year expiring on 21.11.2005. No extension or any fresh guarantee was given thereafter. Respondent no.5 was subjected to block assessment under Section 158 BC of the Act vide order dated 30.5.2005 and a tax liability of Rs. 8,82,236/- was determined. The assessing authority accordingly vide notice dated 19.9.2005 issued under Section 226 (3) of the Act directed the Bank to pay the aforesaid amount of tax with interest, total amounting to Rs.9,08,702/- as part of the Bank Guarantee furnished by it. A sum of Rs. 10,08,476/- by encashing some of the fixed deposits was accordingly paid to respondents no. 2 and 3. Thereafter without any further demand of any tax, the Commissioner of Income Tax (Central) Kanpur on 18/21.11.05 issued directions under Section 281B/226(3) of the Act to the Bank for the attachment of the remaining fixed deposits under the Bank Guarantee to the extent of the balance amount of Rs. 24,91,298/-. The request of the petitioners in writing to release the fixed deposits on the expiry of the period of guarantee was not considered. Ultimately, on 1.11.06 the said amount was released by the Bank in favour of the Commissioner of Income Tax (Central) Kanpur after encashing the remaining fixed deposits of the petitioners in view of the penalty order dated 18.10.2006 imposing penalty of Rs. 22,36,172/- upon respondent no. 5. The petitioners are aggrieved by the encashment and release of the fixed deposits aforesaid.

It is in the above back-drop that the petitioners have invoked writ jurisdiction of this Court for issuance of the following directions:-

> "(i) a suitable writ, order or direction in the nature of mandamus directing the Assessing Officer, respondent no.3 to forthwith refund the amount of the STDRs/FDRs to the petitioners, encashed and paid by the State Bank of India, Aonla Branch, Bareilly to the Income Tax Department on 1.11.2006 together with the interest at the rate of 15% per annum from 22.11.2005 upto the date of the payment of the said refund to the petitioners.

(ii) a suitable writ, order or direction in the nature of certiorari calling for the record of the case to and quashing the letter and notice both dated 18/21.11.2005 under Section 281B/226(3) of the Income-tax Act, 1961 issued by the respondent no. as contained in Annexure- to the writ petition.

(iii) any other suitable writ, order direction which this Hon'ble Court may deem fit and proper in the facts and circumstances of the case ; and

(iv) award the cost of the writ petition to the petitioner."

In substance the basic prayer of the petitioners is for refund of the encashed amount of the fixed deposits which were attached on 18/21.11.2005 and was paid and released on 1.11.06 in favour of the Commissioner of Income Tax (Central) by the Bank, along with interest on the said amount @ 15% per annum w.e.f. 22.11.2005 and secondly for quashing of the letter/order of attachment dated 18/21.11.2005 of the Commissioner of Income Tax (Central) Kanpur for attachment of the fixed deposit receipts /Bank Guarantee.

We have heard Sri Pankaj Naqvi, learned counsel for the petitioners, Sri Bharat Ji Agrawal, Senior counsel assisted by Sri A.N. Mahajan, learned counsel appearing for the Income Tax Department ie. respondents no. 2 and 3 and Smt. Archana Singh, learned counsel for the Bank ie., respondent no.4. We have also perused the pleadings of the parties.

On the basis of the respective submissions of the parties, the following points arise for determination in the present writ petition:

1. Whether the fixed deposits of the petitioners which were furnished as security to the Bank respondent no. 4 for extending Bank Guarantee could have been encashed after the expiry of the period of the Bank Guarantee even though they were attached during the

subsistence of the guarantee period?

2. Whether the attachment dated 18/21.11.2005 of the Bank Guarantee/fixed deposits was valid?

A preliminary objection with regard to locus of the petitioners to maintain this writ petition for a direction to refund the amount as against the Income Tax Department or against the Bank has also been raised.

First, we would like to deal with the preliminary objection of the respondents with regard to locus of the petitioners in filing the present writ petition.

In examining the above objection let us have a glance on the term 'Bank Guarantee'.

Bank Guarantee is not a very old concept. It is of a recent origin which now forms the backbone of the banking system. It has not been defined in any statute though a 'contract of guarantee' has been defined in Section 126 of the Contract Act, 1982. A contract of guarantee is generally a tripartite agreement involving a surety, principal debtor and the creditor wherein a person who gives the guarantee is called the “surety”; the person on whose behalf guarantee is given is called “principal debtor” ; and the person to whom the guarantee is given is called “the creditor” or the “beneficiary”. Bank Guarantee is also a similar kind of contract. However, if a contract of Bank Guarantee is examined in depth instead of three, sometimes a fourth player also comes into picture though not described in the contract. This generally happens when the principal debtor himself has nothing to offer to the Bank to enable it to give guarantee on his behalf and a fourth party steps into to offer security. This undisclosed fourth person is one who offers his property in any shape including fixed deposits to the Bank for the purposes of extending Bank Guarantee for the principal debtor to the creditor.

In the Banking system Bank Guarantee has dual aspects. It is not merely a contract between the bank and the beneficiary but it is also a contract of security between the Bank and the third party ie. who offers his property for the purposes of executing the Bank Guarantee. Bank

Guarantee is therefore a special and an autonomous contract which is independent, separate and distinguishable from the contract from which the liability of the principal debtor arises. Accordingly, it has to be construed on its own terms independent of any other contract between the aforesaid parties *inter se*.

It is common knowledge that except where public interest is involved, only the person aggrieved having a legal right and suffering a wrong alone is entitle to invoke the writ jurisdiction. Normally, a person aggrieved is one against whom a decision has been pronounced wrongly depriving him of something or adversely affecting his right over something but it does not include any kind of disappointment or personal inconvenience. In the case at hand, the petitioners are the undescribed party in the contract of Bank Guarantee as the Bank had executed the said guarantee for and on behalf of respondent no. 5 on the strength of the fixed deposits offered by the petitioners. Therefore, if their fixed deposits have been encashed or misappropriated in violation of terms and conditions of the contract of Bank Guarantee then certainly they have been wronged and their right to property ie., fixed deposits has been infringed to which they are entitle to redressal in law. Respondents no. 2 and 3 as well as respondent no. 4 in invoking the Bank Guarantee in effect have encashed the fixed deposits of the petitioners. Accordingly, we are of the opinion that even though the petitioners may not be *ex-facie* party to the contract of Bank Guarantee they have a judicially enforceable right to reclaim the amount invested in the fixed deposits if it has been misappropriated or unauthorizedly encashed by invoking the Bank Guarantee. The view which we have taken above finds support from the Division Bench decision of the Calcutta High Court reported in ***AIR 1975 Calcutta 145 State Bank of India Vs. The Economic Trading Co. S. A. A. and others*** wherein their Lordships observed as under:-

> "*In seeking to enforce the Bank Guarantee the beneficiary of the guarantee, in effect, sought to realise the security furnished by the third party and*

the third party had, therefore, locus standi to challenge the enforcement of the guarantee."

We therefore, over rule the preliminary objection and hold that the petitioners are entitle to invoke writ jurisdiction under the facts and circumstances of the case.

Now let us examine the the validity of the directions contained in the letter/order dated 18/21.11.05 for attachment and payment of balance amount under the fixed deposits.

Section 222 of the Act authorises the Tax Recovery Officer to adopt any of the modes prescribed therein to recover the tax due where an assessee against whom tax is due and payable commits default in its payment or is deemed to be in default. Section 226(3) of the Act empowers the assessing/recovery officer to direct any person who holds or is likely to hold any money for or on account of the assessee to pay to him so much of the money which is sufficient to satisfy the amount due to the assessee. It is applicable when money is due to the assessee from any person (See ***(2007) 10 SCC 101 Administrator Unit Trust of India Vs. B.M. Malani & others).*** A combined reading of the aforesaid provisions clearly indicates that the procedure prescribed under Section 226(3) of the Act can only be resorted to when tax is payable and the assessee is in default or deemed to have defaulted in its payment and not otherwise. Default would arise only when there is a demand. Admittedly, on 18/21.11.05 the assessee (respondent no. 5) was not in default or deemed default of any tax due. Thus, no order or direction could have been given for such payment to the Bank. Sri Bharat Ji Agrawal in all fairness as such accepted that Section 226 (3) of the Act is not attracted but the attachment is valid under Section 281B of the Act.

This brings us to Section 281 B of the Act which provides for the provisional attachment of the property belonging to the assessee for a period of six months from the date of such attachment unless extended but excluding the period of stay of assessment proceedings, if any. The

language of the above provision is plain and simple. It provides for the attachment of the property of the assessee only and of no one else. The golden rule of interpretation of statutes is that the statute has to be construed according to its plain, literal and grammatical meaning unless its leads to absurdity. The fixed deposits of the petitioners not being the property of the assessee as such were not open to attachment.

In view of the aforesaid discussion in our opinion the order dated 18/21.11.05 is patently illegal.

Now we come to the basic question about the validity of the encashment of the fixed deposits of the petitioners for which it is considered appropriate to examine the import of the term 'attachment'.

"Attachment" like the term Bank Guarantee, has also not been defined in any statute, though it is widely used in the Code of Civil Procedure as well as in the Income Tax Act. The word "attachment" in its most simple sense means to 'tie or fasten'. It therefore speaks about imposing restriction. It is somewhat equivalent to arrest. As by arrest restrictions are placed on movement of a person so by attachment restrictions are placed over the property whether movable or immovable or in the form of actionable claims. Legally "attachment" would mean imposing restriction upon some kind of property by the Court or some other competent, statutory authority. The order of "attachment" as such tells the owner of the property, the custodian of the property and the world at large not to deal with the property attached. Apart from the above restriction, the order of "attachment" carries no other meaning. It is essentially an order to safe-guard and protect the interest of the creditor from being defeated and to enable him to release his dues without any let or hindrance subsequently.

The effect of the order of attachment, as explained earlier was only to restrict the Bank as well as the owners of the fixed deposits from dealing with the fixed deposits and nothing more. It in no way authorized respondents no. 3 and 4 to invoke the Bank Guarantee so as to encash the fixed deposits of the petitioners that too after the expiry of the period of Bank Guarantee.

The Bank Guarantee was valid initially for a period of one year from 22.1.2003 ending on 21.11.2004 which period was extended for another one year expiring on 21.11.2005. It was not extended thereafter and no new Bank Guarantee was executed. The petitioners have also not offered their fixed deposits as security for furnishing Bank Guarantee after 21.11.2005. Therefore, in the normal circumstances after the expiry of the period of Bank Guarantee the fixed deposits could not have been encashed and the petitioners would have been free to deal with their fixed deposits in their own way without any restriction either by the Bank or the beneficiary. In such a situation, the respondents could not have invoked the Bank Guarantee and encashed the fixed deposits of the petitioners after 22.11.2005 so as to make payment out of the fixed deposits. However, the difficulty arose due to the order dated 18/21.11.2005 alleged to have been issued under Section 281 B read with 226 (3) of the Act by the Commissioner of Income Tax (Central) Kanpur. This order has been found to be illegal. Therefore, also it does not come to the help of the respondents.

Moreover, the order of attachment was passed on 18/21.11.05. It was provisional in nature. Its life was only 6 months. Accordingly, it ceased to remain in force after expiry of 6 months from the aforesaid date and was not operative on 1.11.06. There is nothing on record to show its extension. In view of the above also no payment could have been made on 1.11.06.

It appears, the Bank under pressure of the order of “attachment” without the consent of the petitioners released the amount of the fixed deposits in favour of the respondents no. 3 and 4 even though the Bank Guarantee had ceased to be in force; the attachment was illegal and does not have effect of authorising payment; and had lapsed on expiry of six months from the date of attachment. Thus, the action of the Bank in releasing the amount under the fixed deposits was patently illegally and in clear violation of the terms and conditions of the contract of the Bank Guarantee.

To sum up, the conclusions are as under:-

1. Ordinarily, in a contract of Bank Guarantee there are only 3 parties but sometimes there also happens to be a fourth party as in the present case.
2. The life of the Bank Guarantee as per its terms and condition was only upto 21.11.05.
3. The provision of Section 226(3) of the Act was not applicable.
4. The order of attachment of the fixed deposits of the petitioners passed under Section 281 B of the Act was illegal.
5. In any case order of attachment was provisional in nature and was valid only for a period of six months from the date of attachment which period had expired much before 1.11.06.
6. The order of attachment only places restrictions in dealing with the property and does not authorises the encashment of the fixed deposits.
7. The encashment of the fixed deposits on the expiry of the period of Bank Guarantee, cessation of the provisional attachment which otherwise was illegal and in no way authorised the encashment of the fixed deposits was totally unjustified.

In view of the aforesaid facts and circumstances, we are of the considered opinion that the petitioners have been wronged and their fixed deposits have been illegally encashed by the Bank and payment released on 1.11.2006 in favour of the respondents no. 2 and 3.

We are conscious that ordinarily disputes arising from a contract are not to be adjudicated in exercise of writ jurisdiction but we have proceeded to decide the matter on merits as only a pure legal question was involved and the facts were not disputed. It is also high time to avoid technicalities in imparting justice and to bring disputes to their logical end and to grant the appropriate relief as may be found suitable in law, equity and justice, otherwise it would be negation of discretionary powers vested in Court.

Accordingly, we allow the writ petition and issue a writ of certiorari quashing the order dated 18/21.11.05 (Annexure-7) and also a writ of mandamus commanding respondents no. 2, 3 and 4 to refund the

petitioners the amount of their fixed deposits which were encashed on 1.11.2006 within a period of one month with simple interest @ 8% per annum w.e.f. 1.11.06 till the date of refund. The primary liability to refund the aforesaid amount with interest as directed is upon the respondent no. 4 Bank who is set at liberty to claim the said amount from respondents no. 2 and 3 in accordance with law.

In the event the amount aforesaid with interest is not refunded within the period stipulated above, the petitioners would be entitle to further interest @ 10% on the above amount including interest so accrued.

Petition allowed. No order as to costs.

Dt.30th March 2010

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