

IN THE SPECIAL COURT (TRIAL OF OFFENCES RELATING

APPLICATION NO. 155 OF 1994

IN

RC11(S)/92 - SCB.BOM & RC 44A/92 ACB BOM

Royal Commonwealth Society for the
Blind Employees Provident Fund ...Applicants

Versus

1. Shri. A. K. Menon, Custodian
2. Central Bureau of Investigation
3. J. R. Kanekar,
Assistant Commissioner of
Income Tax, Bombay.
4. S. K. Lele, Esq.,
Provisional Liquidator, Bank of
Karad Ltd. (In Liquidation)
5. Bhupendra C. Dalal
6. The Reserve Bank of India , ...Respondents

Mr. K. A. Setalvad, i/b.. M/s. Nanu Hormasjee & Co.
for the Applicant.

Mr. G. R. Joshi i/b. M/s. P. M. Mithi & Co. for
Respondent No. 1.

Mr. Bhandary i/b. M/s. Bhandary & Bhandary for
Respondent No. 4.

Mr. Dinesh C. Shah for Respondent No. 5.

Advocates for Respondent Nos. 1 and 5
undertake to file Vakalatnama.

CORAM: S. N. VARIAVA J.
JUDGE, SPECIAL COURT.
7th June 1994.

ORAL ORDER :

1. This is an unfortunate instance of the

Applicants having been taken for a ride by the 5th Respondent. At the outset it must be stated that the Court has fully sympathy for the Applicants and numerous other similarly situated parties. As set out hereafter the Court cannot override the provisions of the Special Court (Trial of Offences Relating to Transactions in Securities) Act (hereafter called 'the said Act') and therefore is powerless to assist Applicants at this stage.

2. The facts briefly stated are that the Applicants herein as well as a number of other Provident Funds (of various Companies) had entered into contracts with the 5th Respondent for purchase of securities. All of them have paid monies to the 5th Respondent. In most cases the securities were never delivered.

3. The 5th Respondent had filed in this Court Misc. Application No. 28 of 1992 for a declaration that these various Companies funds had become the owners of the securities. This Court by its Order dated 3rd November 1993 had negatived this contention. This Court held that the attempt of the 5th Respondent (herein) was nothing else but an ingenious attempt to convert the loss of the 5th Respondent into the loss of the various other parties and at the same time wipe off the claims of these parties against the 5th Respondent. In that

Order the question whether the monies received by the 5th Respondent continued to be monies belonging to the various parties was not decided. This was left open.

4. The Applicant is one of the parties to whom securities have not been delivered. By this Application they pray for return of the sum of Rs. 25,149-81 ps. which the Applicants had paid to the 5th Respondent towards the purchase of "Any State Loan 6.3/4% ". The contract note is dated 6th March 1992. The amount was paid by cheque on 9th March 1992. A delivery order dated 2nd April 1992 had also been delivered to the Applicants. As set out in detail in the Order dated 3rd November 1993 in Misc. Application No. 28 of 1992, this delivery Order did not amount to an appropriation. Also this delivery order was on the Bank of Karad who is now represented by Respondent No. 4.

5. It has been submitted that the monies which have been paid by the Applicants to the 5th Respondent are not monies belonging to the 5th Respondent. It is submitted that what can be attached under Section 3 of the said Act are only properties belonging to a Notified party. It is submitted that the monies which had been paid to the 5th Respondent continued to be monies belonging to the Applicants till such time as there was

actual delivery of securities.

6. Reliance is placed upon the authority in the case of Late Nawab Sir Mir Osman Ali Khan vs. Commissioner of Wealth Tax, Hyderabad reported in (1986) 3 S. C. R. Page 1072. In this case the Supreme Court was considering whether a property which had been sold by the Assessee without executing a Registered Sale Deed and for which full consideration was received and possession handed over to the Purchaser could be considered to be property belonging to the Assessee and thus an Asset of the Assessee for purposes of Wealth Tax. In my view this authority far from helping Applicants is against them. **The Supreme Court holds (on Page 1083) that the term "belonging to" indicates something over which a person has dominion. Once monies were received by the 5th Respondent he had absolute legal domain over the monies. He had disposing power over the monies.**

7. Reliance is also placed upon the meaning of the term "belonging to" in Butterworths "Words and Phrases", legally defined, 3rd Edition Page 161. In my view even the definitions as given in Butterworths would go against the Applicant.

8. It is submitted that till such time as the securities were delivered the monies were held by the 5th Respondent in trust for the Applicants.

It is submitted that once monies or properties are held in trust, they cannot be said to be properties belonging to that party. In support of this, reliance is placed upon the authority in the case of Heritable Reversionary Company Ltd. vs. Millar (M'Kay's Trustee) reported in (1892) Appeal Cases Page 598. There can be no dispute with this proposition of law. However, as set out hereafter it cannot be said that the monies are held in trust.

9. Whilst this Court sympathises with the Applicants, it is not possible to accept the contention of the Applicants and lay down a bad precedent. The Applicants and the 5th Respondent have entered into a contract to purchase and sell securities. In pursuance of that contract monies have been paid as and by way of price of the Securities. If after payment of the money the 5th Respondent has failed to deliver then the only remedy of the Applicants is to claim damages against the 5th Respondent and/or as set out hereafter to claim restitution. **Monies which have been paid under a contract as and by way of price are not held in trust by a vendor/seller. Therefore, there is no question of these monies having been held by the 5th Respondent in trust. Also once monies are paid under such a contract the**

seller becomes entitled as of right to deal with the money as if it is his own property. Even otherwise, there is a practical difficulty inasmuch as the Applicants have not been able to show that any particular amount lying in the account of the 5th Respondent is the amount which had been advanced by them. In fact, at the time of the Notification there was not sufficient amount to meet the liability of the various parties who had paid 5th Respondent under identical contracts. The 5th Respondent had already utilised most of the monies received from the Applicants as well as the various other parties for his own purposes. Whatever amounts were available were utilised for paying tax liabilities of 5th Respondent.

10. It is next submitted that an attachment of the monies amounts to a cancellation of the contract and for this reason also the Applicant is not entitled to this money. I am unable to accept this submission also. The attachment is a statutory attachment under the said Act. Section 4 of the said Act gives a power to the Custodian to cancel contracts which are fraudulent or entered into with the intention of defeating provisions of the said Act. A reading of the said Act makes it very clear that the statutory attachment and/or the enactment of the said Act, in no way vitiated or

avoided contracts which had been entered into. It is because the contracts are not vitiated and/or avoided that Section 4 gives the power to the Custodian to avoid the contract under certain circumstances.

11. It is lastly submitted that in any event under Section 65 of the Contract Act, the Applicant is entitled to restitution. There can be no dispute with that proposition. However, under Section 11 of the said Act, restitution can only be at the stage of final distribution. I leave it open to the Applicant to make their claim for restitution at the stage of the final distribution. It may only be mentioned that even if it had been held that the monies were held by the 5th Respondent in trust, even then under Section 66 of the Trust Act, the Applicant would only have ranked as a Secured Creditor. He would still have had to recover only at time of final distribution under Section 11 of the said Act. However, as stated above, the monies are not held in trust by the 5th Respondent.

12. Application stands disposed off accordingly.