

\$~6 & 7

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Reserved on: 02.07.2013

Decided on: 10.09.2013

+ **RFA(OS) 92/2009, C.M. APPL.15171/2009**

SHRI RAKESH KUMAR AGARWAL Appellant

versus

BANSAL COMMODITIES & ORS Respondents

+ **RFA(OS) 17/2010, C.M. APPL.3608/2010 & C.M. APPL.3611/2010**

COMMISSIONER OF INCOME TAX-XIII Appellant

versus

BANSAL COMMODITIES & ORS. Respondents

Through: Sh. Sanjeev Rajpal, Advocate, [for
Resp. No.2 in Item No. 6 and for appellant
in Item No.7).

Sh. V.N. Jha and Sh. Shashwat Bajpai,
Advocates (Item Nos.6 and 7)

Sh. Sandeep Sethi, Sr. Advocate with Sh.
Mahendra Rana, Advocates.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE NAJMI WAZIRI

MR. JUSTICE S. RAVINDRA BHAT

%

C.M. APPL.3608/2010 (for condonation of delay in filing)
IN RFA(OS) 17/2010

For the reasons mentioned in the application, C.M. Appl. 3608/2010 is allowed.

RFA(OS) 92/2009, C.M. APPL.15171/2009

RFA(OS) 17/2010, C.M. APPL.3611/2010

1. These two are appeals by the Commissioner of Income Tax (CIT) and Rakesh Agrawal (hereafter called by his name) against the *ex parte* decree of a Learned Single Judge in CS (OS) No. 1128/2004. The suit claimed a money decree for ₹50.40 lakhs, with interest at 18% per annum from 28th April, 1989 till the date of payment. The money is currently in the possession of the Appellant in RFA(OS) 17/2010 (hereafter called “the CIT”), in the form of seven Pay Orders.

2. The dispute in this case arose from interaction of three parties: the Revenue authorities (CIT), M/s. Bansal Commodities, Sh. Puranmal Bansal and Sh. Suresh Bansal (the latter two being partners of M/s. Bansal Commodities, respondents in both sets of appeals as well as original plaintiffs in the suit, collectively referred to as “Bansal Commodities”), and Rakesh Kumar Agrawal, the fourth respondent in the

CIT's appeal, and Appellant in RFA(OS) 92/2009, a defendant in the original suit.

3. The facts are that on 27.04.1989, the Income Tax Department conducted a search and seizure operation under Section 132 of the Income Tax Act at the residential and business premises of Sh. Rakesh Kumar Agrawal. As a result of this operation, seven Pay Orders dated 25.04.1989 for a total amount of ₹50.40 lakhs debited to the account of one Sh. Surinder Kumar, issued to one M/s Hindustan Copper Ltd. were discovered. Under Section 132(1), the Income Tax authorities issued an order of deemed seizure of the seven Pay Orders as against Surinder Kumar, (presenting the Pay Orders to the Manager, Punjab National Bank) and under Section 132(5), the Asst. Commissioner of Income Tax (ACIT) passed an order recording the seizure as against the tax dues of Surinder Kumar. The pay orders remained in the possession of the Bansal Commodities, who did not present them for payment, but instead, approached the Income Tax authorities.

4. On 30.01.1990, CIT issued an order under Section 132 (12) holding that since a regular assessment had been made in the case of Surinder Kumar, and the entire bank deposits were recoverable against tax levied on him, M/s. Bansal Commodities' application was infructuous. Consequently, on 28.08.1990, M/s. Bansal Commodities filed a writ petition before this Court, W.P.(C) 1253/1990, challenging the orders of

the CIT. That writ petition was dismissed by the Court. However, the Supreme Court subsequently set aside the orders of this Court and the CIT and remitted the matter back to the CIT for fresh consideration.

5. In these fresh proceedings, by an order of 04.06.1992, the CIT dismissed the petition filed by M/s. Bansal Commodities under Section 132(11) and held that the money represented by the seven Pay Orders belonged to Surinder Kumar. In the meanwhile, Rakesh Kumar Agrawal – on 04.09.1990 and 08.10.1990 –filed a Settlement Petition under Section 245C(1) before the Income Tax Settlement Commission (“ITSC”) for settlement of his case for the Assessment Years 1985-86 to 1990-91. On 15.03.1993, the ITSC admitted the Settlement Petition through an order passed under Section 245D(1), and on 29.06.1999, held – contrary to the CIT’s finding, (after the matter was remitted by the Supreme Court) – that the money represented by the seven Pay Orders belonged to Bansal Commodities, and not Surinder Kumar. Against this, Rakesh Kumar Agrawal, the first defendant, in the suit, filed a writ petition, W.P.(C) 5082/1999, before this Court. Likewise, aggrieved by the CIT’s denial (for the second time) of its petition, Bansal Commodities had filed a writ petition, W.P.(C) 3738/1994, before this Court, questioning that order. In W.P.(C) 5082/1999, this Court – on 15.11.2000 – remitted the matter back to the ITSC to take a fresh look with regard to the

question of ownership of the amount of ₹50.40 lakhs represented by the seven Pay Orders. Accordingly, on a fresh consideration of the matter, on 06.08.2002, the Income Tax Settlement Commission passed an order under Section 245D(4) and held that the money represented by the seven Pay Orders belonged to Rakesh Kumar Agrawal. As far as W.P.(C) 3738/1994 was concerned, this Court disposed off the petition. The Court left the matter for adjudication by the civil Court, waiving the limitation period.

6. The relevant portion of the order dated 20.05.2004 is as under:

“XXXXXX XXXXXX XXXXXX

After hearing the matter at some length, the counsel for the petitioner as well as the Revenue has fairly stated that the Court need not express any opinion on the merits of the case and the parties be relegated to the Civil Court to sort out their disputes. A request was also made that the amount which is lying with the Income Tax Department may not be released for a period of eight weeks.

On behalf of the original assessed, it was contended that the writ petition should be dismissed.

Since we are not expressing any opinion and we are relegating the petitioner to the Civil Court, in the subject matter before us, we dispose of this petition with a direction to the Revenue not to disburse the amount for a period of eight weeks. It

goes without saying that the party was agitating the cause before this Court under a bona fide belief that the Court will pass an appropriate relief but as the parties are now being relegated to the Civil Court, the question of limitation should not arise. It goes without saying that if the petitioner approaches the Civil Court, the observations made by the Income Tax Department or the Settlement Commission with regard to the title over the said seven pay orders will not bind the parties and will be decided by the Civil Court independently.

With these directions, the writ petition is disposed of.”

7. The Defendant No. 1, Rakesh Kumar Agrawal had filed Special Leave Petition (against the order dated 20.05.2004 in W.P.(C) 3738/1994) before the Supreme Court. By order dated 18.08.2005, the SLP was dismissed holding that the order did not affect the rights of the Defendant No. 1 as he was not made a party. The order of the Supreme Court dated 18.08.2005 is as follows:

“Since the petitioner was not made a party to the proceedings before the impugned order was passed, we do not entertain this petition as the order does not affect his rights. The special leave petition is dismissed.

8. It was in these circumstances that M/s. Bansal Commodities filed Suit No. 1128/2004 for recovery of damages, declaration and permanent and mandatory injunction against Sh. Rakesh Kumar Agrawal, as also the Revenue.

Although the Revenue had filed a written statement in those proceedings, on 28.07.2006, it was proceeded against *ex parte*. Rakesh Kumar Agrawal, too was set down *ex-parte*. M/s. Bansal Commodities filed an affidavit by way of evidence, which was tendered before the Court on 26.03.2009. Finally, on 04.09.2009, the Learned Single Judge by the impugned judgment decreed the suit against the Revenue as well as Rakesh Kumar Agrawal. Based on this decree, the plaintiffs filed an Execution Petition No. 267/2009.

Appellants' contentions

9. The CIT claims in its appeal that it became aware of the *ex parte* decree only upon receipt of the Notice issued by this Court in the Execution Petition on 20.11.2009, whereupon permission was sought from the Learned Single Judge to move an application to set aside the *ex parte* decree. In the meanwhile, Rakesh Kumar Agrawal preferred an appeal, RFA (OS) 92/2009 (after having had an application for setting aside of the *ex parte* decree dismissed in default), which was admitted on 18.01.2010 and when, operation of the order of the Learned Single Judge was stayed.

10. Though the litigation history has been described above, it is also important – at this stage – to mention the factual background of the underlying dispute, i.e. to whom does the money represented by the seven pay orders belong.

11. M/s. Bansal Commodities is a registered partnership firm in which Mr. Puranmal Bansal and Mr. Suresh Bansal are partners. It was involved in the business of trading non-ferrous alloys, a business Rakesh Kumar Agrawal was also involved in through various concerns (M/s. Popular Industries, M/s. Prominent Enterprises, M/s. Manoj Metal Industries and M/s. Jasoria Industries). Laying their claim to the amount represented by the seven pay orders, M/s. Bansal Commodities, in the words of the Learned Single Judge claimed as follows:

“1. that in or about January, 1989 the plaintiffs desired to purchase 58 metric tonnes of copper alloy and negotiations ensued with the defendant No.1 who agreed to sell the same to the plaintiffs for a total price of Rs 49.03 lacs; that the plaintiffs at the asking of the defendant No.1 got issued pay orders for a total sum of Rs 49.03 lacs in the aforesaid four names in which the defendant No.1 was carrying on business; that the defendant No.1 assured delivery of copper alloy within 30 days and also agreed to pay interest on the amount received by him @ of 18% per annum.; that the defendant No.1 however failed to deliver copper alloy to the plaintiffs though confirmed the monies received from the plaintiffs in his accounts for the period ending 31st March, 1989; that on 26th April, 1989, the defendant No.1 handed 7 pay orders to the plaintiffs for aggregate sum of Rs 50.40 lacs issued by Punjab National Bank, Mal Road Branch, Delhi i.e., Rs 49.03 lacs received together with interest due till then — the said pay orders were drawn in favour of M/s Hindustan Copper Limited;, the plaintiffs were to approach Hindustan Copper Limited with the said pay

orders and collect the base metal copper which could be converted into copper alloy.”

12. The absence of representation on behalf of CIT and Rakesh Kumar Agrawal resulted in no issues being framed by the Court. In the proceedings that led to the impugned order, arguments put forward by Rakesh Kumar Agrawal were confined to the aspect of limitation (paragraph 7 of the Impugned Order). On this question of limitation, alongside the suit, M/s. Bansal Commodities had filed an application, I.A. No. 7753/2004, under Section 14 of the Limitation Act. In its order dated 18.04.2006, the Court noted that this question could only be decided after evidence, and thus, while considering the question of whether the suit was within time or not, the Section 14 application would also be considered.

13. The learned Single Judge by the impugned judgment considered two questions: first, on liability, and secondly, on limitation. On liability, the learned Single Judge noted that – in view of the materials presented by M/s. Bansal Commodities, and the evidence on record – the liability for the amount represented by the seven Pay Orders from Rakesh Kumar Agrawal to M/s. Bansal Commodities was clear. The learned Single Judge noted, at paragraph 9 of the Impugned judgment that:

“9. The evidence of the said witness of the plaintiffs qua the transaction aforesaid with the defendant No.1 remains unrebutted. Thus the same

is to be believed and the plaintiffs would be entitled to the decree for recovery of money against the defendant No.1 save for the aspect of limitation. This court while considering the application of the defendant No.1 for setting aside of the ex parte had also as aforesaid on September, 2008 examined the defendant No. 1. From the said examination also, the liability of the Defendant No. 1 for the money claimed is established.”

On the question of limitation, the Learned Single Judge – after a thorough examination of the history of the case and rulings of the Supreme Court – concluded that M/s. Bansal Commodities’ claim to the money in question was not barred by time.

Appellants’ contentions

14. In the present proceedings, the CIT, as well as Rakesh Kumar Agrawal question the impugned Order on two grounds: that the suit is barred by Section 293 of the Income Tax Act and in the alternative, dispute Rakesh Kumar Agarwal’s liability and the version of the facts presents by M/s. Bansal Commodities, on various grounds, i.e. unexplained relationship with Mr. Kumar, failure to present any documentary evidence of an agreement between M/s. Bansal Commodities and Rakesh Kumar Agrawal as to the sale of copper etc., allegations of collusion between the two parties, M/s. Bansal Commodities and its constituent partners not being “holders” or “holders in due course” of the seven pay orders, and thus, not having any right, title or interest in them and that the action is barred by the Benami Transactions (Prohibition Act), 1988).

15. The Appellants submit that in the writ petition that led to the litigation before the civil court, i.e. W.P.(C) 3738/1994, challenging the order of the CIT dated 04.06.1992, there was no claim challenging the validity of the said order and indeed, there could not have been such a challenge. This, the Appellant argues, is because such a challenge would fall foul of Section 293. Even otherwise, the Appellant argues that no claim to set aside the CIT order was made, and thus, the said order attained finality. The further argument is, that the only remedy available to a person (when property is alleged to be belonging to him/her, but seized for the income tax dues of another), is to move an appropriate application under Section 132(11). In this case, such an application was moved but rejected, and thus, the order of the CIT attained finality.

16. The Appellants, Rakesh Kumar Agrawal and the CIT, submitted that the suit modified the order made under Section 132, through the wrongful interference of the civil Court, which is prohibited by Section 293. Moreover, it is argued that the scope of Section 293 is wide enough to include any proceedings under the Income Tax Act and the provision does not admit any ambiguity for exceptions to be read into it. Thus, if ultimately a suit is to result in a decree or order made under the Act, it (the suit) would not be maintainable. Moreover, the Appellants argue that the bar under Section 293 is a statutory one, incapable of waiver, either by the consent of parties or

otherwise, and thus, the finding in the impugned judgment that by consenting to the order by the Division Bench in W.P.(C) 3738/1994, dated 20.05.2004, the Appellant herein waived its right is incorrect.

17. It is submitted that the learned Single Judge could not have gone into the factual material and relied on so-called inconsistencies of statements recorded in the course of Income Tax proceedings. It was submitted that quite apart from the issue of jurisdiction, the facts of the case also revealed that the amount which was sought to be recovered, i.e. ₹50.40 lakhs had been directly dealt with by the revenue (income tax authorities) and adjusted against the liabilities of Rakesh Kumar Agrawal. In these circumstances, the Court's decree amounted to varying the order of the CIT, contrary to Section 293. Counsel for the appellants relied on the judgment of the Supreme Court reported as *Commissioner of Income Tax Bhubaneswar and Anr., v. Parmeshwari Devi Sultania*, (1998) 3 SCC 481 in support of the argument about the Court's lack of jurisdiction to deal with the subject matter.

Contentions of the Respondent M/s. Bansal Commodities

18. It is argued by the plaintiff, M/s. Bansal Commodities that the appellants are estopped from objecting to the jurisdiction of the civil Court. Heavy reliance is placed on the order dated 20.05.2004 of this Court, in W.P.(C) 3738/1994,

where the revenue (CIT's) consent to the trial of disputed facts, by the civil Court, was recorded. It was submitted that having acquiesced to the Civil Court's jurisdiction, there can be now no objection by the appellant in that regard.

19. The respondents argue that the unrebutted materials on the record of the suit, i.e. the testimony of witnesses of the plaintiffs who proved various documents, viz. (Ex- PW1/47, PW1/48, PW1/20, PW1/49 to 58, PW1/36, statements/correspondence) in which Rakesh Kumar Agrawal unambiguously admitted M/s. Bansal Commodities' claim with respect to the transaction with the said defendant. The respondent, M/s. Bansal Commodities also rely upon the order dated 29th June, 1999 (PW1/62) of the Settlement Commission *inter alia* recording that the seven pay orders belonged to them and could not be treated as an asset of or belonging to Rakesh Kumar Agrawal and allowing their deduction as liability. It was stated that no infirmity could be found with the conclusions and decree of the learned Single Judge.

20. Learned senior counsel for the respondent/plaintiff also distinguished the Supreme Court ruling in *Parmeshwari Devi (supra)* and submitted that it was rendered on an entirely different set of facts and circumstances. Counsel highlighted the fact that the judgment arose in the context of a claim for movables, in family partition proceedings, and the observations of the Court could not be given the wide import that the

appellants are seeking to give in the present case. It was submitted that the jurisdiction of the civil Court to decide complicated issues of fact, in the context of rival claims to property could not be precluded by any provision of the Income Tax Act. It was argued further in this context that the right to a full trial with opportunity to cross-examine witnesses could not be substituted by adjudication of a statutory adjudicator, with little or no training to render decisions in complex civil disputes, involving analysis of facts and law. The provisions of the Income Tax Act, especially Section 132 indicated dispute resolution in a summary manner, which was but a poor substitute for trial by an independent and impartial judge, trained in the law, and applying the law relating to evidence and Civil Procedure. It was submitted that the plaintiff was entitled to the benefit of Section 14 of the Limitation Act. In this regard, reliance was placed on the rulings reported as *Raghunath Das v. Gokal Chand* AIR 1958 SC 827; *Union of India and Ors. v. West Coast Paper Mills Ltd.* (2004) 3 SCC 458 and *Nrityamani Dassi v. L. Chandra Sen* AIR 1916 PC 96.

21. Learned senior counsel for the respondents also relied upon the decision reported as *State of Kerala v Ramaswami Iyer & Sons* AIR 1966 SC 1738, where it was observed that:

“12. It is true that even if the jurisdiction of the civil court is excluded, where the provisions of the statute have not been complied with or the statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure,

the civil courts have jurisdiction to examine those cases : Secretary of State for India v. Mask & Company(1966 (1) SCR 64). Counsel for the respondents urged that the case of the respondents fall within that exception, since the Sales-tax Officer in imposing tax-liability acted in defiance of the mandatory provisions of the Act and in support of the argument he placed reliance upon r. 7 of the Rules framed under the Act and the definition of "turnover" under the Act. Under the Act sales-tax is charged for the year at the prescribed rates on the total turnover of the dealer.....”

Analysis and Findings

22. As noticed, the facts are that duly authorized Income Tax Officers carried out search and seizure operations at the residential and business premises of M/s. Bansal Commodities on 27th April, 1989. During these, seven Pay Orders for ₹50.40 lakhs, prepared from the accounts on 26th April, 1989 were found. The Income Tax officials, on 28th April, 1989 issued a deemed seizure order with respect to the 7 pay orders for ₹50.40 lakhs and served it upon the Manager, Punjab National Bank. The original pay orders were in the control and possession of the plaintiffs, M/s. Bansal Commodities. The plaintiffs, resultantly did not present the pay orders for payment and approached Income Tax Authorities with respect the same. Income tax proceedings then onward rambled on. Finally, the plaintiff's efforts at securing release from the Income tax authorities ended, with an order by the CIT, rejecting their

application under Section 132 (11). They approached this Court, challenging that order, under Article 226 of the Constitution of India. On 20th May, 2004, that writ petition was dismissed, relegating M/s. Bansal Commodities to a civil Court for its remedies by way of a suit, through a consent order. The suit, filed later, was decreed in full, by the impugned judgment. The first objection to the impugned judgment is that it was barred by Section 293 of the Income Tax Act; the second argument of the appellants is that the learned Single Judge should not have entertained the suit since no ground to give the benefit of Section 14 of the Limitation Act, had been made out.

23. The issue presented before the Court is whether the present proceedings are barred by Section 293 of the Income Tax Act. The section reads:

“293. Bar of suits in Civil Courts. No suit shall be brought in any civil court to set aside or modify any proceeding taken or order made under this Act; and no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under this Act.”

24. The fact that the assessment conducted as against Rakesh Kumar Agrawal was closed, and proceedings under Section 132 – along with the objections presented under Section 132 (10), which were considered and rejected under Section 123 (12) – were carried out is clear in this case. The Section 132 proceedings and the deemed seizure of the seven pay orders

(and the representative amount) as against Mr. Kumar's tax dues were conducted and finalized in accordance with the procedure under that provision, and to that action, there is no dispute in this case. The question, then, is whether the present suit – deciding the liability of Rakesh Kumar Agrawal to M/s. Bansal Commodities – is barred. There can be no dispute that the question of liability itself, as a matter of a contractual agreement between the parties, is a matter properly reserved for the jurisdiction of the civil court. The question, here, however, does not concern the private remedies that lie between the two parties in this case, but whether, the ownership of the seven pay orders – seized by the income tax authorities under Section 132 - can be subject matter of the present suit.

25. This very question was considered by the Supreme Court in *Commission of Income Tax, Bhubaneswar and Anr. v. Parmeshwari Devi Sultania*, (1998) 3 SCC 481. The issue which the Court was concerned with was partition of certain gold ornaments that had been the subject of search and seizure under Section 132. In deciding that the suit – in so far as it concerned the ownership of the gold ornaments – was barred, the Court noted at paragraph 9 as follows:

“9. It (the High Court) failed to consider the effect of the decree if passed in the suit on the order under Section 132(5) of the Act or other proceedings under Section 132B of the Act. When Section 293 originally stood, it (sic) provided that "no suit

shall be brought in any Civil Court to set aside or modify any assessment or order made under this Act". The word "assessment" was omitted and the words "proceeding taken" were inserted in its place. This made the section more comprehensive in nature. Direct effect of the decree in the suit would be that the gold ornaments, subject matter of this suit, would be taken out of the order of the Income Tax Officer under Section 132(5) of the Act and would not be available to be applied in proceedings under Section 132B of the Act.....”

26. As in this case, the Revenue may not adjudicate on the question of liability of Mr. Agrawal to Bansal Commodities, just as in *Parmeshwari*, the Supreme Court held that:

“[i]t (was) not the case of the Revenue that Income Tax Authority can grant decree for partition.”

Neither is it true that such a construction of Section 293 leaves third parties without a remedy. Section 132(11) provides the third person, (in this case M/s. Bansal Commodities), with the necessary opportunity to present its case or claim that it is the real and true owner or the beneficial owner of the proceeds (or amounts) under the seven pay orders, before the Income Tax authorities. That was, in fact, done in this case. The result of the present suit being held to be maintainable and the judgment of the Learned Single Judge allowed to operate, would be, in the words of the Supreme Court:

“the direct effect of getting that order of the Income-tax Officer under Section 132(5) of the Act

set aside or modified to that extent. This Section 293 does not permit...”

Equally, the Supreme Court noted that:

“Section 293 is quite specific and does not admit of any ambiguity if ultimately a suit is to result in a decree or order which sets aside or modifies any proceeding taken or order made under the Act, that suit would not be maintainable. We are not concerned with the frame of the suit as such but to see the ultimate result to which the suit as such but to see the ultimate result to which the suit would lead to.”

27. Similarly, this question was also considered by this Court in *Prem Kumar and Sons (HUF) v. Union of India and Ors.*, [2006] 280 ITR 152 (Delhi), where the Income Tax authorities proceeded under Section 132 to seize certain assets alleged to belong to the Hindu Joint Family from the appellant assessee. The appellant had also filed a suit against the Income Tax authorities for recovery of a certain amount as for financial loss the plaintiff had suffered as a result of loss of interest on the maturity value of the financial assets seized. In that proceeding, the Single Judge Court dismissed the suit given the provisions of Section 293, and on appeal, the Court noted that where a specific remedy is available under Section 132 (in that case the remedy lay in the provisions on payment of interest under Section 132B), the jurisdiction of the Civil Court remains barred. In this case, M/s. Bansal Commodities clearly had recourse to Section 132(11), which they took advantage of, though ultimately their view was rejected by the Income Tax

authorities in accordance with the statutory discretion vested in it. Thus, Section 293 clearly comes into operation in this case. This Court further notices that in *Union of India v. Natwerlal M. Badiani* 250 ITR 641, a Full Bench of the Gujarat High Court, in the context of the submission regarding a ban of suits in civil Courts under Section 293 of the Income-tax Act, 1961, held that:-

“22. In the case at hand, Civil Suits have been filed and entertained against the public officers while they were acting under the warrant of authorisation under section 132 of the Income-tax Act, 1961, read with Rule 112(1) of the Income-tax Rules and ex parte ad interim order was passed. Section 293 of the Income-Tax Act in terms creates a bar of suits in Civil Court in such matters against action of the public officer under warrant of authorisation under section 132 of the Income-tax Act and it is certainly a proceeding taken or order made under the Income-tax Act and section 293 in terms says that no prosecution, suit or other proceeding shall lie against the Government or any officer of the Government for anything in good faith done or intended to be done under the Act. In the case of CIT v. Parmeshwari Devi Sultania, the Supreme Court held that the substance and not the form of the suit is to be seen and where a certain asset was seized during search and rejecting the assessee's plea that the same included the shares of his brothers and sisters, the Income-tax Officer passed an order under section 132(5) determining the tax liabilities and directing the asset to be retained by the Department and the suit filed at the instance of the assessee for partition of that very asset was held not to be maintainable. It is,

therefore, clear that in the facts of the present case also the suits were clearly barred by the provisions of section 293 of the Income-Tax Act and the civil court had no jurisdiction to entertain the suit against the proceedings for search and seizure, which were being taken under section 132 of the Income-tax Act, 1961, read with rule 112 (1) of the Income-tax Rules, 1962.”

28. Significantly, the order under Section 132 effecting a deemed seizure of the pay orders as against the tax dues of Rakesh Kumar Agrawal continues to operate till date, having never been set aside in any writ proceeding before this Court or the Special Leave Petition before the Supreme Court. Therefore, the effect of the present suit – with the form not being determination, but rather the substance of the relief claimed – would be that the order under Section 132 would necessarily be required to be modified, and thus, Section 293 prohibits the present action. The impugned judgment of the Learned Single Judge – that the ownership of the seven pay orders lies with M/s. Bansal Commodities – and the order of the CIT, i.e. that the seven pay orders are to be utilized as against the tax dues of Mr. Kumar – cannot stand together. With proceedings under Section 132 having been initiated in 1989 and having attained finality in terms of the procedure within that provision being complied with, Section 293 mandates that the jurisdiction of the civil court with respect to the present suit is barred.

29. As far as the question of applicability of Section 14 of the Limitation Act is concerned, this Court is of opinion that the issue had to be decided in favour of M/s. Bansal Commodities, the plaintiff. There is sufficient material on the record disclosing that the said plaintiff had been pursuing its remedies under the Income Tax Act diligently, because its applications before the CIT were considered on the merit; it felt aggrieved, and had to approach this Court twice, under Article 226 of the Constitution of India. It was in those proceedings, that on 20.05.2004, that the Division Bench recorded that the proper forum to agitate disputed questions about the ownership of the seven pay orders would be the Civil Court. There has indeed been no lack of *bona fides* on the part of the respondent in filing the suit, after the said order. In these circumstances, the benefit of Section 14 would be available. This finding is rendered because arguments on this score were made by the parties.

30. The plaintiff (Bansal Commodities) had urged during the proceedings that the consent recorded on 20th May 2004 precluded the CIT from urging the ground of lack of jurisdiction. The decision of the Privy Council in the case of *Ledgard vs. Bull* ((1886) L.R. 13A. 134) is an authority for the proposition that consent or waiver can cure defect of jurisdiction but *cannot cure inherent lack of jurisdiction*. In that case, the suit had been instituted in the Court of the Subordinate Judge, who was incompetent to try it. By consent of the parties,

the case was transferred to the Court of the District Judge for convenience of trial. It was held by the Privy Council that as the Court in the suit had been originally instituted was entirely lacking in jurisdiction, in the sense that it was incompetent to try it, whatever happened subsequently was a nullity because *consent of parties could not operate to confer jurisdiction on a Court which was incompetent to try the suit*. This finds support in subsequent decisions (*Chiranjilal Shrilal Goenka v Jasjit Singh & Ors* 1993 (2) SCC 507; *Harshad Chimanlal Modi v. DLF Universal Ltd. & Anr* (2005) 7 SCC 791). Accordingly, the CIT's alleged consent does not, under any case, operate to confer jurisdiction on a civil court that is barred by statute.

31. In the light of the above discussion, it is held that Section 293 of the Income Tax barred the suit filed by M/s. Bansal Commodities. We are conscious that in the facts of this case, the view taken by this judgment will operate harshly on the plaintiff. The Court, therefore, grants liberty to the said plaintiffs to seek leave to revive the writ petition previously disposed off on 20th May, 2004 [W.P.(C) 3738/1994], through an appropriate application. This course is, in the opinion of this Court, essential because the said order was not made on the merits of the writ petition, but on an assumption that such disputes can indeed be the subject matter of adjudication by the civil courts. If such application is made, we would request the Division Bench to consider expeditious disposal of the same.

32. The appeals are, therefore allowed; however subject to the liberty reserved to the respondents, M/s Bansal Commodities, in terms of the preceding paragraph. There shall be no order as to costs.

(S. RAVINDRA BHAT)
JUDGE

(NAJMI WAZIRI)
JUDGE

SEPTEMBER 10, 2013