

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

% *Judgment Reserved on : January 20, 2016*
Judgment Delivered on : February 01, 2016

+ **FAO(OS) 295/2015**

VLS FINANCE LTD.

..... Appellant

Represented by: Mr.Jayant K.Mehta, Advocate with
Mr.Nikhil Rohtagi, Mr.Ashok
K.Sharma and Mr.S.Khosla,
Advocates

versus

BMS IT INSTITUTE PRIVATE
LIMITED & ORS.

..... Respondent

Represented by: Mr.Anil Airi, Advocate with Mr.Ravi
Krishan Chandna, Mr.Aman Madan,
Mr.Ishan Khanna and Ms.Bindiya
Airi, Advocates for R-1, R-2, R-3 and
R-10
Mr.Gurkamal Hera Arora, Advocate
for R-4 to R-9
Mr.Amit Saxena, Advocate for R-12

FAO(OS) 503/2015

KAILASH CHAND JAIN & ORS.

..... Appellants

Represented by: Mr.Gurkamal Hera Arora, Advocate

versus

VLS FINANCE LTD. & ORS.

..... Respondents

Represented by: Mr.Jayant K.Mehta, Advocate with
Mr.Nikhil Rohtagi, Mr.Ashok
K.Sharma and Mr.S.Khosla,
Advocates for R-1
Mr.Anil Airi, Advocate with Mr.Ravi
Krishan Chandna, Mr.Aman Madan,

Mr.Ishan Khanna and Ms.Bindiya
Airi, Advocates for R-2 to R-7
Mr.Amit Saxena, Advocate for R-12

FAO(OS) 411/2015

DINESH KUMAR GUPTA & ORS. Appellants
Represented by: Mr.Anil Airi, Advocate with Mr.Ravi
Krishan Chandna, Mr.Aman Madan,
Mr.Ishan Khanna and Ms.Bindiya
Airi, Advocates

versus

M/S.VLS FINANCE LTD. & ORS. Respondents
Represented by: Mr.Jayant K.Mehta, Advocate with
Mr.Nikhil Rohtagi, Mr.Ashok
K.Sharma and Mr.S.Khosla,
Advocates for R-1
Mr.Gurkamal Hera Arora, Advocate
for R-2 to R-7
Mr.Amit Saxena, Advocate for R-12

CORAM:
HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE MUKTA GUPTA

PRADEEP NANDRAJOG, J.

1. We shall be referring to the parties as : (i) VLS, (ii) BMS, (iii) Gupta Group, (iv) Jain Group, (v) Navjeevan, (vi) NPMG, and (vii) Southend.
2. VLS is named VLS Finance Ltd. It was the petitioner in OMP (I) No.114/2015, filed under Section 9 of the Arbitration and Conciliation Act, 1996. The petition was filed after an award dated March 02, 2015 was pronounced in its favour by an Arbitral Tribunal, as per which the Gupta Group and the Jain Group were liable to pay to VLS a sum of

₹84,28,27,987/- (Rupees Eighty Four Crores Twenty Eight Lacs Twenty Seven Thousand Nine Hundred and Eighty Seven only) together with simple interest @ 15% on the sum of ₹24,92,00,000/- (Rupees Twenty Four Crores and Ninety Two Lacs only) from October 01, 2012 till date of payment. VLS was to transfer its shareholding in favour of the Gupta Group and the Jain Group in BMS. BMS is named BMS IT Institute Pvt. Ltd. It is a company registered under the Companies Act, 1956. The Gupta Group comprises Dinesh Kumar Gupta and his wife Madhu Gupta. The Jain Group comprises Kailash Chand Jain, Parul Jain, Ankit Jain, Santosh Kumar Jain, Subhash Chand (HUF) and Swati Jain. Navjeevan is named Navjeevan Associates Pvt. Ltd. It is a company registered under the Companies Act, 1956. NPMG is named NPMG Developers Ltd. It is a company registered under the Companies Act, 1956. Southend is named Southend Infrastructure Pvt. Ltd. It is a company registered under the Companies Act, 1956.

3. To secure the sum as per the award VLS filed the petition under Section 9 of the Arbitration and Conciliation Act, 1996 praying as under:-

“(i) Direct the Respondent Nos. 2 to 10 to jointly deposit in a no lien interest bearing account in a scheduled bank a sum of ₹93,62,77,987/- as security for the amount awarded under the award dated 02.03.2015;

(ii) Alternatively to prayer (i), direct the Respondent Nos. 2 to 10, jointly and severally, to furnish a bank: guarantee from a scheduled bank for a sum of ₹93,62,77,987/- and direct them to furnish further bank guarantees monthly to secure the interest accrued on the awarded amount each month until execution of the award dated 02.03.2015;

(iii) Restrain the Respondent Nos. 2 to 10 from dealing with any of their movable and immovable properties as

mentioned in Annexures P-4 (Colly), P-6 (Colly) and P-11 (Colly) including, in particular, those set out in paragraph 22 of the petition pending execution of the award dated 02.03.2015;

(iv) Restrain the Respondent No.12 from creating any kind of third party rights or encumbrances or dealing in any manner whatsoever with its share (i.e. 47.5%) of constructed area in terms of the Conveyance Deed dated 10.06.2013 and appoint a Court Receiver for the said share of Southend under the Conveyance Deed dated 10.06.2013 pending the execution of the award dated 02.03.2015;

(v) Restrain the Respondent No.1 from creating any kind of third party rights or encumbrances or dealing in any manner whatsoever with its share (i.e. 44%) of constructed area in Property bearing no. C-20, 1A/10, Block 'C' Sector 62 NOIDA in terms of the Collaboration Agreement with Premia Structures Ltd. and appoint a Court Receiver for the said share of BMS;

(vi) Extend and confirm the orders dated 27.04.2012 and 04.09.2012 passed in OMP No. 383/2012 and order dated 15.01.2015 passed in OMP Nos.570/2013 and 1197/2014;

(vii) Pass ex-parte ad interim orders in terms of the above prayers and confirm the same upon return of notice; and

(viii) Pass such other order or orders as this Hon'ble court may deem fit and proper in the facts and circumstances of the case."

4. BMS was respondent No.1. The Gupta Group and the Jain Group were impleaded as respondents No.2 to 9. Navjeevan was respondent No.10. NPMG was respondent No.11 and Southend was respondent No.12 in the petition filed by VLS.

5. Vide impugned order dated May 05, 2015 the said petition has been decided by the learned Single Judge granting interim measure as under:-

“(i) The respondent Nos.2 to 10 shall not sell, encumber, alienate and deal with the properties and equity shares of various companies listed by them in their respective affidavits filed on March 27, 2015.

(ii) The respondent Nos.2 to 10 shall maintain status quo with respect to title and possession of the property at C-20, 1A/10, Block-C, Sector-62, Noida, U.P.

(iii) The respondent Nos.2 to 10 shall not deal with the shares of respondent Nos.1, 11 & 12 and also with respect to shares of respondent Nos.2 to 10 no transfer will be registered by respondent Nos.1, 11 & 12.”

6. The grievance of VLS in FAO (OS) No.295/2015, is premised on the alleged inadequacy to secure the sum awarded. The main grievance relates to directions not being passed injuncting Southend concerning property bearing B-319, Okhla Industrial Area, Phase-I which property has been encumbered by Southend in favour of one M/s.Wonder Space Properties Pvt. Ltd.

7. Grievance of the Jain Group in FAO (OS) No.503/2015, is to they being restrained from encumbering their properties disclosed by them in their respective affidavits filed on March 27, 2015.

8. Grievance of the Gupta Group in FAO (OS) No.411/2015 is to the impugned order in its totality granting limited relief to VLS. In the impugned order the learned Single Judge has per profiled various orders passed in earlier petitions filed before arbitration commenced under Section 9 of the Arbitration and Conciliation Act, 1996 in OMP No.383/2012, OMP

No.570/2013, Contempt Cast No.736/2012, Contempt Case No.970/2013 and Contempt Case No.87/2014 to bring home the point that the Gupta Group and the Jain Group had not only siphoned off the money from BMS but had also reduced their shareholding in Southend. The learned Single Judge has noted various acts of commission by the Gupta Group and the Jain Group to transfer money here and there and this forms the signature tune of the impugned order to pass the three interim directions noted by us in paragraph 5 above.

9. We would therefore briefly note the facts necessary to adjudicate the three appeals. VLS, BMS along with the Gupta Group and the Jain Group entered into two agreements on July 12, 2007 and September 24, 2007, as per which VLS invested ₹24.92 crores in the equity capital of BMS, having right to exit with obligation on the Gupta Group and the Jain Group to purchase the shares at a price as per the pre-determined formula for computing exit consideration. The equity injected in BMS was to be utilized for construction of a building on a plot of land bearing No.C-20, 1A/10, Block-C, Sector-62, Noida, UP, perpetual lease-hold rights whereof had been acquired by BMS. The Arbitral Tribunal has found, and during arguments in the appeals it was not disputed by learned counsel for the Gupta Group and the Jain Group that BMS advanced a loan, without any security, to NPMG in sum of ₹19,09,45,000/- (Rupees Nineteen Crores Nine Lacs and Forty Five Thousand only) in which Dinesh Kumar Gupta holds 4600 shares and there is no material before us regarding subscribed and paid up share capital of same company and names of other shareholders with percentage of shareholding. The allegation concerning shareholding of NPMG by VLS that it is a company owned and controlled by the Gupta

Group and the Jain Group is therefore sans any material particulars in the pleadings and least bit material placed to make good the plea. BMS has admittedly extended another unsecured loan to M/s.Axiom Buildwell Pvt. Ltd., statedly owned and controlled by Dinesh Kumar Gupta; but without any material particulars in the pleadings and sans any material to make good the plea. A sum of ₹42,47,214/- (Rupees Forty Two Lacs Forty Seven Thousand Two Hundred and Fourteen only) has been advanced to one Sushma Mittal, wife of Mangal Singh Mittal, a shareholder in BMS. As per Southend the shareholding of the Gupta Group and the Jain Group between the years 2009 and 2014, has fluctuated, and it would be useful if we put it in a tabular form. It would be as under:-

	Annual Return as on 30/09/2009- 25/09/10	Annual Return as on 26/09/2011- 12	Annual Return as on 23/09/2013	Annual Return as on 24/06/2014
Dinesh Kumar Gupta – R2	210250 shares	410250 shares	263250 shares	189250 shares
Madhu Gupta – R 3	12250 shares	12250 shares	12250 shares	12250 shares
Subhash Chand – R 8	5000 shares	5000 shares	5000 shares	5000 shares
Priyanka Gupta (Daughter of R2 & R3)	20000 shares	20000 shares	20000 shares	20000 shares
Chhaya Jain(Family member of R4 & R7	10000 shares	10000 shares	10000 shares	10000 shares
Reetu Jain (Family member of R4	5000 shares	5000 shares	5000 shares	5000 shares

& R7)				
Anita Jain (Relative if R5, R6, R8 & R9)	90000 shares	90000 shares	90000 shares	90000 shares
Anuj Kumar Agarwal (Director of R 11)	2500 shares	2500 shares	-	2500 shares
Vikrant Puri	5000 shares	5000 shares	197000 shares	271000 shares
Neema Gupta(Allotte d fresh shares)			2500 shares	-
Lalwani Holdings (P) Ltd. (Fresh shares allotted to third party)		45000 shares	45000 shares	45000 shares
Chaurasia Holdings (P) Ltd. (Fresh shares allotted to third party)		45000 shares	45000 shares	45000 shares

10. In paragraph 68 of the award dated March 02, 2015, the Arbitral Tribunal has returned a finding of fact as under:-

*“68. Therefore these documents do not at all show any evidence of any activities of the respondents 2 to 10 towards the construction of the project. The respondents had received the money from the claimant and had routed it through their own companies and stripping off towards the investment in the company. Out of ₹24 crores the respondents 2 to 10 diverted ₹19 crores to NPNG (**Sic. Should read NPMG**) which passed on ₹12 crores to R-2 D.K.Gupta and his wife. If the project was requiring funds it is not explained why this was done.”*

11. Before the learned Single Judge the Gupta Group and the Jain Group had no explanation for diverting the funds of BMS in which VLS had injected equity in sum of ₹24.92 crores. On the one hand learned counsel for Guptas and Jains justified a collaboration agreement with Premia Projects Ltd. for construction of a building on the plot of land at Noida on the plea that BMS was short of funds and therefore the collaboration agreement under which Premia was to invest money to construct the building and appropriate 56% of the built up space leaving 44% as the share of BMS.

12. The material on record shows that Gupta Group and Jain Group has transferred money from BMS to individuals and companies without any security obtained in return. They have been diluting their shareholdings in said companies. The material justifies a satisfaction to be recorded by the Court that Guptas and Jains, with intent to obstruct or delay the execution of the decree passed against them as per the award would dispose of their properties and thus the restraint order against the Gupta Group and the Jain Group concerning their individual properties and shareholding in the companies, with further direction against BMS, NPMG and Southend not to register transfer of their shares is fully justified.

13. That apart, as has been noted by the learned Single Judge the Guptas and the Jains have prima-facie violated the interim order dated April 27, 2012 passed in OMP No.383/2012. Attempt made by them evinced by filing IA No.10835/2014 seeking modification of the injunction order passed against them to get around the order by offering to submit a bank guarantee, but not abiding therewith, also justifies a restraint order against them and concerning their shares in BMS, NPMG and Southend. They have faced

contempt action thrice. The same is an add-on factor to justify the first and the third interim measure granted against them.

14. Thus, challenge by the Gupta Group and Jain Group concerning the first and the third interim measure granted by the learned Single Judge is therefore repelled by us.

15. We therefore can focus with precision concerning the second interim measure directed i.e. the Gupta Group and the Jain Group to maintain status quo with respect to title and possession of the Noida property, in which as noted above Premia Projects Ltd. has entered into a collaboration agreement to construct a building on the plot of land at Noida and share of BMS being 44% in the built up space.

16. Since Premia Infrastructure Ltd. is not a party to the proceedings and there is no material to show any siphoning off funds in favour of said company, nor is there any material to show that said company is owned and controlled by Gupta Group and Jain Group, the direction by the learned Single Judge to maintain status quo with respect to title and possession qua the Noida property would obviously mean to maintain status quo with respect to 44% share of BMS in the built up space. So understood, the interim measure is fully justified because the Gupta Group and the Jain Group have in the past siphoned away the funds and diluted the assets of BMS and past conduct justifies a restraint order concerning said share of BMS because there is every likelihood of the Gupta Group and Jain Group continuing with their acts of misfeasance.

17. FAO (OS) No.503/2015 and FAO (OS) No.411/2015 are accordingly without any merit and are dismissed.

18. Concerning FAO (OS) No.295/2015, the target obviously is Southend and its property at Okhla Industrial Area, Phase-I which has been encumbered by Southend in favour of M/s.Wonder Space Properties Pvt. Ltd.

19. We have noted hereinabove in paragraph 9 the shareholding in Southend which shows that whereas the Gupta Group and the Jain Group have maintained their shareholding from the year 2009 till the year 2014 save and except Dinesh Kumar Gupta having decreased his shareholding from 210250 shares to 189250 shares, shareholding of one Vikrant Puri which was 5000 shares in the year 2009 increased to 271000 shares in the year 2014. One Neema Gupta was allotted 2500 shares for the first time in the year 2013 which became nil in the year 2014. 45000 shares each were allotted to one Lalwani Holdings Pvt. Ltd. and Chaurasia Holdings Pvt. Ltd. in the year 2011, when disputes had not even surfaced.

20. The shareholding of respondent No.12 would therefore show that whereas the Gupta Group and the Jain Group hold 334000 shares, Vikrant Puri, Lalwani Holdings Pvt. Ltd. and Chaurasia Holdings Pvt. Ltd. hold 361000 shares. The holding of the Gupta and the Jain Group would therefore be 48.057% and that of Vikrant Puri, Lalwani Holdings Pvt. Ltd. and Chaurasia Holdings Pvt. Ltd. would be 51.943%.

21. Concerning flow of funds to Southend, the only averment apart from dilution of shareholding of the Gupta Group and the Jain Group in the company, would be:-

“The appellant has now learnt that the NPMG in turn also gave loans to Southend. In this manner, the appellant’s investment in BMS was siphoned off by the respondents and moneys given to Southend.”

22. Unless, on the principles analogous to the principles of tracing, case is made out on facts concerning Southend, no relief can be granted to VLS concerning the assets of Southend.

23. That takes us to identifying the principle of tracing.

24. The said principle was applied by the House of Lords in (1992) 4 All.ER 512 Lipkin Gorman versus Karpnale. The facts were that one Cass, a partner in a solicitors' firm had withdrawn money and gambled at the defendant's casino and had lost £154695 out of the funds/money derived/withdrawn from the solicitors' firm. The solicitors firm claimed restitution of the said amount by relying upon law and equity. Lord Templeman in his speech observed :-

“Conversion does not lie for money, taken and received as currency: see Orton v. Butler (1822) 5 B. & Ald. 652 and Foster v. Green (1862) 7 H. & N. 881. But the law imposes an obligation on the recipient of stolen money to pay an equivalent sum to the victim if the recipient has been "unjustly enriched" at the expense of the true owner. In Fibrosa Spolka Akcyjna v. Fairbairn Lawson Combe Barbour Ltd. [1943] A.C. 32, 61, Lord Wright said:

"It is clear that any civilised system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is to prevent a man from retaining the money of or some benefit derived from another which it is against conscience that he should keep."

25. The ratio of the decision would therefore be that the law of restitution is not based upon implied or quasi contract theories but upon the principle

that unjust enrichment must be restituted.

26. Section 18 of the Gaming Act, 1845, was noted in the decision as per which contracts by way of gaming or wagering are null and void but not illegal in England. It was thus held that the amount retained by the defendant club out of the ‘*stolen*’ money of the solicitors’ firm cannot be retained and must be repaid to the solicitors. The decision reported as 1816 (4) MNS 475 Hudson v Robinson was noted and the observations therein were referred to with approval as under:-

“In Hudson v. Robinson (1816) 4 M. & S. 475, a partner fraudulently contracted in the names of the partnership to sell goods to the plaintiff. The fraud received the purchase price from the plaintiff and defaulted in delivery of the goods. It was held that the plaintiff could recover the purchase price from the fraud as money had and received. Lord Ellenborough C.J. said, at p. 478:

"It is said that an action for money had and received is not maintainable in this case. But an action for money had and received is maintainable whenever the money of one man has, without consideration, got into the pocket of another. Here the money of the plaintiffs has got into the pocket of the defendant; and the question is whether this has been without any consideration. The consideration was the supposed right of the defendant to dispose of the goods as partnership property, which was the inducement to the plaintiffs to give this bill, under which they have been obliged to pay the money. The defendant had no such right; therefore the absence of any consideration entitles the plaintiffs to maintain this action, and still more so where the money has got

into the defendant's pocket through the medium of a fraud."

Here the money of the solicitors got into the pocket of the club without any consideration."

27. Making a reference to the decision reported as 1881 (18) Chan DW 188 Bainbrigge v Browne it was observed:-

"In Bainbrigge v. Browne (1881) 18 Ch.D. 188, the plaintiff children, under the influence of their father, charged by deed their reversionary interest under a settlement as security for advances made by the defendants to the father. Fry J. held, at p. 197, that undue influence:

"operates against the person who is able to exercise the influence (in this case it was the father) and in my Judgment, it would operate against every volunteer who claimed under him, and also against every person who claimed under him with notice of the equity there by created or with notice of the circumstances from which the court infers the equity."

On the facts the defendants who were not volunteers did not have the requisite notice and were entitled to enforce their security. In the present case the club is in the same position as a volunteer."

28. A decision of the High Court of Australia reported as 1910 (12) C.L.R. 105 Black versus S. Freeman and Company was quoted with approval, in which case pertaining to money stolen by a husband and handed over to the wife as gift could be recovered by the victim. The High Court of Australia had held:-

“Where money has been stolen, it is trust money in the hands of the thief, and he cannot divest it of that character. If he pays it over to another person, then it may be followed into that other person's hands. If, of course, that other person shows that it has come to him bona fide for valuable consideration, and without notice, it then may lose its character as trust money and cannot be recovered. But if it is handed over merely as a gift, it does not matter whether there is notice or not.”

29. Opinion of Bankes, L.J. in the decision reported as (1921) 1 K.B. 321 Banque Beige Pour l'Etranger vs Hambrouck was also approved, with the following observations in said case quoted:-

“To accept either of the two contentions with which I have been so far dealing would be to assent to the proposition that a thief who has stolen money, and who from fear of detection hands that money to a beggar who happens to pass, gives a title to the money to the beggar as against the true owner – a proposition which is obviously impossible of acceptance.”

30. In the decision reported as (1774) 1 Cowp. 197 Clarke versus Shee and Johnson, Lofft. 756 it was observed:-

“This is a liberal action in the nature of a bill in equity; and if, under the circumstances of the case, it appears that the defendant cannot in conscience retain what is the subject matter of it, the plaintiff may well support this action . . . the plaintiff does not sue as standing in the place of Wood his clerk: for the money and notes which Wood paid to the defendants, are the identical notes and money of the plaintiff. Where money or notes are paid bona fide, and upon a valuable consideration, they never shall be brought back by the true owner; but where they come mala fide into a person's hands, they are in the nature of specific property; and if their identity can be traced and ascertained, the party has a right to recover.

It is of public benefit and example that it should; but otherwise, if they cannot be followed and identified, because there it might be inconvenient and open a door to fraud. Miller v. Race, 1 Burr. 452: and in Golightly v. Reynolds (1772) Lofft. 88 the identity was traced through different hands and shops. Here the plaintiff sues for his identified property, which has come to the hands of the defendant iniquitously and illegally, in breach of the Act of Parliament, therefore they have no right to retain it: and consequently the plaintiff is well entitled to recover."

31. In his concurring opinion in Lipkin's case, turning to the question of title of money, Lord Goff observed that the plaintiff is entitled to succeed against a third party for money had and received and available for use by the third party, though not if third party had received the money in good faith and for valuable consideration. This was because property in money like other fungibles is lost as much as it is mixed with other money but this is not applicable when the action is founded upon the wrong by a third party. In fact it was conceded by the defendant-club that the solicitors can establish legal title to money and the title was not defeated by mixing of money with other money by cash when it was transferred to other hands. It was accordingly observed:-

"It is well established that a legal owner is entitled to trace his property into its product, provided that the latter is indeed identifiable as the product of his property. Thus, in Taylor v. Plumer (1815) 3 M. & S. 562, where Sir Thomas Plumer gave a draft to a stockbroker for the purpose of buying exchequer bills, and the stockbroker instead used the draft for buying American securities and doubloons for his own purposes, Sir Thomas was able to trace his property into the securities and doubloons in the hands of the stockbroker,

and so defeat a claim made to them by the stockbroker's assignees in bankruptcy. Of course, "tracing" or "following" property into its product involves a decision by the owner of the original property to assert his title to the product in place of his original property. This is sometimes referred to as ratification. I myself would not so describe it; but it has, in my opinion, at least one feature in common with ratification, that it cannot be relied upon so as to render an innocent recipient a wrongdoer (cf. Bolton Partners v. Lambert (1889) 41 Ch.D. 295, 307, per Cotton L.J. - "an act lawful at the time of its performance [cannot] be rendered unlawful, by the application of the doctrine of ratification.")"

32. Lord Goff further dealt at length with the question of change of position by the defendant-club. It was held that change of position can be a valid defence but the change of position must be in good faith. It was further observed that it would be unwise to define the scope of the said defence in abstract terms and the law should be allowed to develop on case to case basis as the law of restitution is based on unjust enrichment of the defendant. It was observed :

".....The answer must be that, where an innocent defendant's position is so changed that he will suffer an injustice if called upon to repay or to repay in full, the injustice of requiring him so to repay outweighs the injustice of denying the plaintiff restitution. If the plaintiff pays money to the defendant under a mistake of fact, and the defendant then, acting in good faith, pays the money or part of it to charity, it is unjust to require the defendant to make restitution to the extent that he has so changed his position. Likewise, on facts such as those in the present case, if a thief steals my money and pays it to a third party who gives it away to charity, that third party should have a good defence to an action for money had and received. In other words, bona fide change of

position should of itself be a good defence in such cases as these. The principle is widely recognised throughout the common law world. It is recognised in the United States of America (see Restatement of Restitution, para. 142, and Palmer on Restitution, vol. III, para. 16.8); it has been judicially recognised by the Supreme Court of Canada (see Rural Municipality of Storthoaks v. Mobil Oil Canada Ltd. (1975) 55 D.L.R. (3d) 1); it has been introduced by statute in New Zealand (Judicature Act 1908, section 94B (as amended)), and in Western Australia (see Western Australia Law Reform (Property, Perpetuities and Succession) Act 1962, section 24, and Western Australia Trustee Act 1962, section 65(8)), and it has been judicially recognised by the Supreme Court of Victoria (see Bank of New South Wales v. Murphett [1983] 1 V.R. 489). In the important case of Australia and New Zealand Banking Group Ltd. v. Westpac Banking Corporation (1988) 78 A.L.R. 187, there are strong indications that the High Court of Australia may be moving towards the same destination (see especially at pp. 162 and 168, per curiam). The time for its recognition in this country is, in my opinion, long overdue.

I am most anxious that, in recognising this defence to actions of restitution, nothing should be said at this stage to inhibit the development of the defence on a case by case basis, in the usual way. It is, of course, plain that the defence is not open to one who has changed his position in bad faith, as here he defendant has paid away the money with knowledge of the facts entitling the plaintiff to restitution; and it is commonly accepted that the defence should not be open to a wrongdoer. These are matters which can, in due course, be considered in depth in cases where they arise for consideration.....

At present I do not wish to state the principle any less broadly than this: that the defence is available to a person whose position has so changed that it would be

inequitable in all the circumstances to require him to make restitution, or alternatively to make restitution in full. I wish to stress however that the mere fact that the defendant has spent the money, in whole or in part, does not of itself render it inequitable that he should be called upon to repay, because the expenditure might in any event have been incurred by him in the ordinary course of things. I fear that the mistaken assumption that mere expenditure of money may be regarded as amounting to a change of position for present purposes has led in the past to opposition by some to recognition of a defence which in fact is likely to be available only on comparatively rare occasions.”

33. Thus, one can safely say that as per the principles of tracing benefits acquired by fraud, breach of confidence, breach of fiduciary relationships or by other wrong doings therefore do not get benefit under the defence of change of position. Further change of position as a defence has to be causally linked to the receipt that makes it inequitable for the recipient to make restitution. Mere fact that the recipient has spend the money whole or in part, does not make it inequitable because expenditure might have been incurred by him in any event in ordinary course of things. But a bona-fide recipient is entitled to establish the defence that he had increased his outgoings as a result of the receipt. [See, para 168, Halsbury’s Law of England, Vol. 40(1), 4th Edition]

34. Since analogous principles need to be applied in the instant case, the sketchy pleadings and no material save and except the shareholding pattern in Southend does not entitle VSL to any order against Southend, which is an independent entity.

35. On the question whether the interim measure granted adequately secures an interest of VLS pending adjudication of objections to the award,

the pleadings in FAO (OS) No.295/2015 have not even attempted to make any reference to the value of the assets covered by the sweep of the interim measure against the Guptas, Jains and BMS.

36. Thus, even FAO (OS) No.295/2015 is liable to be dismissed and the prayer that the Guptas and the Jains be directed to furnish a bank guarantee to secure the sum as per the award is rejected.

37. Recording formally that all three captioned appeals are dismissed, we make no order as to costs.

(PRADEEP NANDRAJOG)
JUDGE

(MUKTA GUPTA)
JUDGE

FEBRUARY 01, 2016
mamta