

(2018) 07 MP CK 0249

In the Madhya Pradesh High Court

Case No : Writ Petition No.21570 OF 2017

Avalanche Multi Trading Pvt. Ltd

APPELLANT

Vs

M.P.F.C. & Anr

RESPONDENT

Date of Decision : 26-07-2018

Acts Referred:

Constitution of India, 1950 — Article 226
State Financial Corporation Act, 1951 — Section 3, 29
Madhya Pradesh VAT Act, 2002 — Section 33

Citation : (2018) 07 MP CK 0249

Hon'ble Judges : Ashok Kumar Joshi, J; P. K. Jaiswal, J

Bench : Division Bench

Advocate : Manoj Munshi, Shekhar Bhargava, Ritu Bhargava, Romesh Dave

Final Decision : Partly Allowed

Judgement

P.K. Jaiswal, J

By this writ petition under Article 226 of the Constitution of India, the petitioner is praying for issuance of appropriate direction to the respondent

No.1 M.P. Financial Corporation (in short 'MPFC') to refund the sale proceeds of Rs.10.51 Crores received from the petitioner along with interest at

the same lending rate which is being charged by the respondent No.1 from its borrowers, as he failed to comply the necessary obligation as per terms

of sale letter dated 18/12/2012(Annexure-P/2) and also direct the respondent No.2 to refund the amount of transfer fees, lease rent and other charges

amounting to Rs.78,68,861/- deposited by the petitioner for transfer of lease and other charges along with interest at the rate of 12% per annum.

2. The M.P. Financial Corporation is a Corporation set up under section 3 of the State Financial Corporation Act, 1951. It was an instrumentality

devised to provide medium and long term credit to industrial concerns in the State.

3. The respondent No.1 " MPFC published the auction notice for sale of industrial unit of Metalman Industries Ltd. under Section 29 of the State

Financial Corporation Act, 1951, for recovery of its dues. However, the respondents did not disclose the fact that there is commercial tax outstanding

of the unit under sale and the Commercial Tax Department has first and prior statutory charge over the assets under auction. The respondent No.1

after taking over the industrial unit had published the auction notice without disclosing the fact that they are not in possession of mortgaged documents

and original title deeds pertaining to assets of the unit.

4. The petitioner considering the assets of Metalman Industries Ltd., along with leasehold land at plot No.17-A, 18 and 19 admeasuring 12,140

Sq.Mtrs. at sector B, Industrial Area, Sanwer Road, Indore free from all encumbrances and charges paid the consideration of Rs.10,51,00,000/-

(Rs.Ten Crores Fifty One Lakhs) for purchase of the said industrial unit. Thereafter, the respondent confirmed the sale in favour of the petitioner vide

letter dated 15.11.2012 (Annexure P/1) confirming that it shall deal with all statutory liabilities of taxes and cess and the petitioner shall not be liable

for any such liability pertaining to period prior to auction. Clause 4, 7, 8, 9 and 10 are relevant which reads as under :-

"4. The statutory liabilities towards PF, ESI and Commercial Tax / Vat only shall be dealt with by the Corporation in accordance with the prevailing

laws out of the sale price.

7. The purchaser shall in its own interest pay the entire sale price to the Corporation at the earliest possible, obtain possession of the assets sold and

get the conveyance deed duly registered.

10. The current assets lying in the unit's premises and not part of the assets sold to you are charged to the Banks who have been informed to fit the

same. In that event, you will handover the said current assets to the Banks under intimation to the Corporation."

The relevant clauses of sale deed dated 10.12.2014 (Annexure P/5) reads as under :-

AND WHEREAS, for meeting the working capital requirement for the said industry, the Borrower Company had availed a working capital medium

term loan of Rs.5,00,00,000/- (Rs.Five Crores only) against mortgage of the said leasehold land along with all immovable / movable assets, both present and future thereon, in favour of the Corporation, more particularly described in the schedules appended to the mortgage document and on the terms and conditions of the Security documents, i.e., Agreement to Create Mortgage and loan documents dated 7.3.2016 along with it's supporting documents.

AND WHEREAS the Corporation along with other bankers, namely the State Bank of India (earstwhile State bank of Indore), Oriental Bank of Commerce and State Bank of Bikaner and Jaipur, were holding first charge ranking pari-passu over the assets of the company among each other for their respective term loans only. Subsequently, consequent upon the repayment of the aforesaid bankers' term loans facilities, the Corporation had become the exclusive first charge holder.

AND WHEREAS since the Borrower Company failed to comply with the terms of the mortgage agreement and the demand notice, the Seller Corporation, in exercise of the powers vested in it under section 29(1) of the State Financial Corporation Act, 1951 (in short SFCs Act) took over the possession of the mortgaged assets (in short referred to as "the Unit") on 4.1.2012 and thereafter took steps in accordance with Section 29(2) of the SFC's Act, 1951 to dispose off the said assets as deemed owner under the said act with a view to recover its debts from the Borrower Company and accordingly offers were invited through tender from prospective buyers. The sale advertisement was published in national and regional newspapers on 18.2.2012 giving the Reserve Price of Rs.9.08 crores and on the terms and conditions specified therein.

5. The petitioner deposited a sum of Rs.78,68,888/- with the respondent No.2 towards transfer of lease fees, lease rent payment and other charges for getting lease transfer and fresh lease deed be executed in favour of the petitioner.

6. The respondent No.1 even after sale of assets in the year 2012 till date did not delivered original deeds, which were mortgaged by the erstwhile industrial unit.

7. The respondent No.1 has sold the industrial unit to the petitioner by suppressing the fact by claiming first charge over the industrial unit sold whereas the first statutory charge with the commercial tax and the respondent

No.1 had no authority to auction the industrial unit on which Commercial Tax Department has first charge.

8. The petitioner despite payment of lease transfer fees and other charges of Rs.78.96 laks could not get the lease transfer and has to resultantly abandon the project. The petitioner is being sufferer due to failure of transfer clear title of the Industrial Unit by the respondent No.1 in favour of the petitioner as due to not having the clear title, the petitioner could not borrow the funds from the Bank or Financial Institutions, which has resulted causing huge financial loss to the petitioner, in addition to the loss of interest which is at the rate of 12% per annum. It was the responsibility of the respondent No.1 to transfer the clear title of the industrial unit to enable the petitioner to commence the commercial production in the unit acquire for the purpose of industrial activity. In sale confirmation letter dated 15.11.2012, Clause 4, the respondent No.1 has undertaken that "the statutory liabilities towards PF, ESI and Commercial Tax / VAT liabilities and the respondent No.1 has utterly failed to perform its obligation which has caused serious financial losses and damages to the petitioner.

9. Learned counsel for the petitioner submits that the respondent No.1 has failed to provide the chain documents, which were deposited by the previous owner of the industries to create equitable mortgage by the deposit of the original title deeds. Unless the previous charge or mortgage have been release, no financial institution shall provide any assistance. It was obligation as seller of the industrial unit to ensure that the buyer gets the clear title of the industrial unit otherwise, the buyer shall not be able to use the asset purchased. According to the petitioner, the respondent No.1 has further in the sale deed asserted that the Corporation has first charge over the industrial unit whereas though suppressed the material fact that the statutory first charge under Section 33 of the M.P. VAT Act, 2002, was with the Commercial Tax Department.

10. In respect of default of payment of Commercial Tax / VAT any other tax under any statute, the respondent No.1 liable to satisfy their dues first, however by suppressing the material fact from the petitioner with respect to first charge and also for failure to deal with the Commercial Tax Department with respect to dues of taxes, the respondent No.1 has caused serious injury and financial losses to the petitioner and thus, the petitioner

has right to get the auction annulled and seek refund of sale proceeds, transfer fees and interest thereon. 11. In reply, the respondent No.1 MPFC

very categorically admitted that the Commercial Tax Department has a first charge over the property in question and he is willing to pay the

department its just dues. Their stand is that the Commercial Tax Department increased its claim from Rs.528.16 lacs in 2013 to Rs.1112.13 lacs in

2016, apparently on coming to know that the Corporation had realized Rs.10.54 crores by sale of the borrower's mortgaged assets under Section 29 of

the SFCs Act. In para 4 the respondent No.1 Corporation very categorically admitted that the MPFC's continues to do everything within its power to

secure return of the said documents from the State Bank of India. Relevant admission in para 4 reads as under :-

“In fact only a matter of time before the Corporation is able to obtain the return of the said documents from the said Bank.

In any case with the petitioner's grievance regarding non-return of the mortgage documents being in the sphere of contract, clearly no writ petition lies

in respect of the said grievance. Besides, if the petitioner company was really serious about obtaining the mortgage documents and original title deeds,

the least it ought to have done was to implead the State Bank of India and ARCIL as party respondents in the present petition. ”

12. In respect of Commercial Tax Department dues, the respondent No.1 very categorically admitted in para 6 of its reply, which reads as under :-

“The fact of the matter is that the respondent Corporation had no knowledge of the Commercial Tax Department's alleged claim against Metalman

Industries Ltd., since at the time of the sale of the unit, there was no notice from the Commercial Tax Department about its alleged dues. However, it

was only on 7.1.2013, two months after the sale letter had been issued in favour of the petitioner vide Annexure P/1, that the Commercial Tax

authorities for the first time wrote to the answering respondent, claiming an amount of Rs.528.16 lacs as alleged sales tax dues recoverable from M/s.

Metalman Industries Ltd. since the said dues were claimed as statutory first charge on the assets of the Company, the Commercial Tax Department

claimed a right to be paid its dues first from the sale amount. The respondent Corporation submits that though the petitioner had purchased the

mortgaged assets after fully satisfying itself about the respondent Corporation's right to sell the same, and was fully aware of the Commercial Tax

Department's aforesaid claim, it (respondent Corporation) tried to sort out the matter, and for the said purpose exchanged several letters with the

Commercial Tax Department??

13. The main objection of the respondent No.1 MPFC is that the State Bank of India, Commercial Tax Department and ARCIL is a necessary party

to the writ proceeding and raised an objection that it is a contractual dispute and a proper remedy to the petitioner is to file a civil suit and prayed for

dismissal of the writ petition.

14. From the aforesaid, it is clear that in respect of default of payment of commercial tax / VAT or any other tax to any statute, the respondent No.1

is liable to satisfy their dues first. The petitioner has no grievance against the Commercial Tax Department, State Bank of India or AIRCL because

there is no privity of contract or relation with any of these parties and, therefore, they were not impleaded in the writ petition.

15. The petitioner has no connection with the dispute whatever may be the respondent No.1 has with the Commercial Tax Department. It was

obligation of the respondent No.1, as per clause 4 of sale confirmation letter dated 15.11.2012 to settle the issues with the PF, ESI and Commercial

Tax Department. In case of failure to honour the commitment and the undertaking by the respondent No.1, the petitioner has lawful right to claim the

annulment of auction sale and refund of the money deposited with the respondent No.1 along with the interest. No legal rights of the petitioner have

been infringed by the Commercial Tax Department, therefore, there was no reason to petitioner to implead the Commercial Tax Department as a

respondent. From the facts and events, it is not in dispute that the respondent no.1 has to proceed to honour its commitment over a period of 5 ½

years, which has caused irreparable loss to the petitioner, as the petitioner could not commence industrial production due to non-availability of the

assistance from the banks or financial institutions in absence of having clear title of the industrial unit.

16. It was the obligation of the respondent No.1 to get the clear title of the industrial unit transfer in favour of the petitioner to which the respondent

No.1 failed miserably, which resultantly comes huge financial loss.Â Thus, the petitioner has lawfully right to get the sale annulled and seek refund of

sale proceed, lease transfer fees along with interest at the rate of 12% per

annum, which the respondent No.1 is charging from their borrowers. Due to inaction and failure on the part of the respondent No.1, the petitioner could not get the clear title of the industrial unit, which has resulted in abundance to industrial project as the petitioner could not get support from the Bank and financial institutions due to nonavailability of the clear title of the industrial unit. The respondent No.1 is solely responsible for the loss, which has caused to the petitioner.

17. It is too late in the day to contend that the instrumentality of the State can commit breach of a solemn undertaking on which other side has acted

and then contend that the party suffering by the breach of contract may sue for damages but cannot compel specific performance of contract. It was

not disputed and in fairness to Shri Bhargava, learned Senior Adv., it must be said that he did not dispute that the Corporation which is set up under

Section 3 of the MPFC Act is an instrumentality of the State and would be 'other authority' under Art. 12 of the Constitution. By its letter dated

15.11.2012, and the subsequent sale deed dated 10.12.2014 the respondent no.1 entered into a solemn agreement in performance of its statutory duty.

Acting on the solemn undertaking, the petitioner proceeded for sale and after acceptance of his bid he deposited a sum of Rs.10,51,00,000/towards

sale proceeds on the solemn promise that as per terms of sale letter and sale deed MPFC will clear the dues of Commercial Tax Department and also

handover all original title deeds etc to the petitioner, but more than 5 ½ years have been passed from the date of issuance of sale letter dated

15.11.2012 in favour of the petitioner, but till today those promise and obligation has not been fulfilled by the MPFC. On its solemn promise evidenced

by the aforesaid documents the petitioner incurred expenses. Presumably, if the said promise was not given by the MPFC, the petitioner may never

purchased the unit in auction. Acting on the promise of the respondent No.1 evidenced by documents, the petitioner proceeded to suffer further. In the

backdrop of this uncontrovertible fact situation, the principle of promissory estoppel would come into play.

18. Thus, the principle of promissory estoppel would certainly estop the Corporation from backing out from its obligation arising from a solemn

promise made by it to the petitioner.

19. In the case in hand, the respondent No.1 cannot act arbitrarily on his mere

whim ignore his promise on some undefined means of necessity or change the conditions. The petitioner acting upon the solemn promise made by the respondent No.1 incurred huge expenditure of Rs.10.51 Crores and if the respondent No.1 is not ready to hold his promise, the petitioner would be put in a very disadvantageous position and therefore also the principle of estoppel can be invoked in this case. The respondent No.1 cannot act arbitrarily and its action must be in conformity with some principle which meets the test of reason and relevance.

20. Now if the respondent No.1 entered into a solemn contract in discharge and performance of its statutory duty and the petitioner acted upon it, the statutory Corporation cannot be allowed to act arbitrarily so as to cause harm and injury, flowing from its unreasonable conduct to the petitioner.

Under these circumstances, the respondent No.1 is directed to clear the dues of the Government within a period of 15 days from today, failing which they are directed to refund the sale proceeds received from the petitioner along with the interest at the same lending rates, which is being charged by the respondent No.1 from its borrowers, within a period of 30 days from the date of order and submit its compliance report.

21. In the result, the writ petition is allowed in part to the extent as indicated hereinabove with cost of Rs.10,000/-.