
(2006) 12 SHI CK 0021
In the High Court Of Himachal Pradesh

Himachal Pradesh State Industrial Development Corpn. Ltd.	APPELLANT
Vs	
Pamwi Tissues Ltd.	RESPONDENT

Date of Decision : 19-12-2006

Acts Referred:

Securities Contracts (Regulation) Act, 1956 — Section 16, 16(1), 9(1)(c)

Citation : (2008) 82 SCL 137

Hon'ble Judges : Surjit Singh, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Surjit Singh, J.—The Himachal Pradesh State Industrial Development Corporation Ltd. (hereinafter referred to as the "plaintiff or Corporation"), has filed this suit against M/s. Pamwi Tissues Ltd. (hereinafter called "defendant No. 1 or company No. 1") and M/s. SWIL name and style changed to M/s. Shalimar Wires Industries Ltd., pursuant to order dated August 28, 2003, of this Court (hereinafter referred to as "defendant No. 2 or company No. 2"), for recovery of a sum of Rs. 44,72,831, pleading the following cause of action.

2. The plaintiff is a company incorporated under the Companies Act and Sh. R.P. Gautam, its Senior Manager (Project), is authorised to file the suit. One of the functions of the plaintiff-Corporation is to provide financial assistance in the form of term loans, equity and soft loans under the Seed Capital Assistance Scheme of IDBI. Defendant No. 1 approached the plaintiff for providing equity assistance to the tune of Rs. 60 lakhs for setting up a project at Barotiwala. The plaintiff acceded to the request of defendant No. 1 and assistance to the tune of Rs. 60 lakhs, as applied for was provided. Defendant No. 1 company allotted six lakhs shares, each valuing Rs. 10 to the plaintiff and it was agreed that the shares will be bought back by company No. 1, on expiry of five years period from the date the project started commercial production.

3. Defendant No. 1 became sick. It approached the Board for Industrial and

Financial Reconstruction, New Delhi, for rehabilitation of its unit. Rehabilitation package was sanctioned on 23-2-1993, as per which the industrial unit of company No. 1 was leased out to company No. 2. The plaintiff approached defendant No. 2 to purchase the shares of defendant No. 1 which were allotted to it as aforesaid. An agreement was executed between the plaintiff and company No. 2 on 26-7-1993. As per terms and conditions of this agreement, defendant No. 2 agreed to purchase the shares and to pay Rs. 60 lakhs together with interest at the rate of 14 per cent per annum to the plaintiff, in 32 equated quarterly instalments on account of the price of the shares. The payment of the instalments was to commence from 30-12-1993. Last instalment was agreed to be paid on 31-3-2001. Defendant No. 2, however, paid only 18 instalments together with interest. It defaulted in the payment of the remaining instalments, though it paid a sum of Rs. 50,000 on account of part payment of the 19th instalment. The plaintiff has, therefore, filed the present suit for the recovery of the sum total of remaining 13 instalments minus Rs. 50,000 together with interest at the agreed rate.

4. Separate written statements have been filed by defendant Nos. 1 and 2. Both of them have raised a number of preliminary objections, besides contesting the suit on merits.

5. Defendant No. 1 has raised the following preliminary submissions:

(i) The plaint does not disclose any enforceable cause of action against defendant No. 1.

(ii) The original agreement for buying back six lakhs shares from the plaintiff was not between the plaintiff and defendant No. 1, but the plaintiff and promoters named Sh. S.S. Khaitan and Sh. M.L. Vohra of defendant No. 1, both of whom are no more and for this reason also, the suit is not maintainable against defendant No. 1.

(iii) The plaintiff's suit is barred by limitation, because as per original agreement of buying back between the promoters of defendant No. 1 and the plaintiff the shares were to be bought back on the expiry of five years from the date of production of the unit and such production having commenced in the year 1983, the plaintiff should have approached the promoters of defendant No. 1 for buying back the shares in 1988, and it having not done so.

(iv) Suit has been filed by a person not authorised by the plaintiff.

(v) The suit is, as a matter of fact, for specific performance of the E contract, but the subject-matter of the agreement not being an immovable property, the agreement is not specifically enforceable under the law.

(vi) Suit is bad for misjoinder of defendant No. 1 and non-joinder of the legal representatives of the abovenamed two promoters of defendant No. 1.

(vii) The agreement between the plaintiff and defendant No. 2, is illegal - F being

without consideration and based on fraud and misrepresentation.

(viii) The agreement is bad in law, as no permission of the Central Government was obtained, as per the provisions of Sections 13 and 16 of the Securities Contracts (Regulation) Act, 1956, and the notification issued thereunder.

6. On the merits, liability of defendant No. 1 to pay the suit money has been denied because of defendant No. 1 being not a party either to the initial agreement for buying back the shares or subsequent agreement under which defendant No. 2 agreed to buy the shares.

7. Defendant No. 2 has also raised a number of preliminary objections, some of which are similar to the aforesaid preliminary objections raised by defendant No. 1. The additional ones are as follows:

(i) Suit against defendant No. 2 based on the subsequent agreement is barred by time.

(ii) The court does not have the territorial jurisdiction.

8. On the merits, defendant No. 2 has denied its liability to pay the suit amount. The statement of account filed with the plaint is alleged to be fabricated.

9. Following issues were framed on the pleadings of the parties:

1. Whether the plaintiff-company is company duly incorporated under the Companies Act, 1956 and whether Rajinder Parshad Gautam is competent to file the present suit on behalf of the plaintiff-company as alleged ? OPP.

2. Whether the plaintiff-company is entitled to recover the suit amount along with interest as claimed if so from whom ? OPP.

3. Whether the suit of the plaintiff is within time ? OPP.

4. Whether the suit is not properly valued for the purpose of court fee and jurisdiction ? OPD.

5. Whether the plaintiff is estopped from filing the suit on account of its acts, deeds, acquiescence, etc., as alleged ? OPD.

6. Whether the suit is not maintainable ? OPD.

7. Whether the agreement dated 26-7-1993, is a result of misrepresentation and fraud ? OPD.

8. Whether the suit is barred under the provisions of the Securities Contracts (Regulation) Act, 1956 ? OPD.

9. Whether the Court has no jurisdiction in the matter as alleged ? OPD.

10. Whether the plaintiff has no cause of action against defendant No. 1, if so, its effect ? OPD.

11. Whether the suit is bad for non-joinder and misjoinder of necessary parties as alleged in preliminary objection No. 7 ? OPD.

12. Relief.

10. My findings on the aforesaid issues are as under:

Issue No. 1:

11. The defendants do not deny that the plaintiff is a company duly incorporated under the Companies Act, 1956. That means, the first part of this issue is superfluous. Both the defendants have denied that Rajinder Parshad Gautam, who has filed the suit on behalf of the plaintiff is authorised and competent to do so. Rajinder Parshad Gautam, has appeared as PW1 and testified that he is authorised vide resolution exhibit PW1/A, passed on the memorandum exhibit PW1/B, to file the suit with prior approval of the managing director. Exhibit PW1 / B is memorandum for the meeting of the board in relation to item No. 12, which pertained to proposal for delegation of various powers to the managing director/ head of division and other officers. Through this memorandum, proposal was submitted to the board of directors. The proposal was summarised in a tabulated form, vide annexure 1, attached to exhibit PW1/B. vide item No. 5, it was proposed that certain officers including Senior Manager (Project) be given full powers subject to approval by the managing director to file suit on behalf of the plaintiff-Corporation. The proposal was approved vide resolution, copy exhibit PW1/A with regard to item No. 12. Sh. Gautam, while in the witness box as PW1 stated that approval for filing suit was accorded vide order passed in the note exhibit PW1/C by the managing director. Item No. 1 of this note exhibit PW1 /C pertains to the authorisation to PW 1-R.P. Gautam, in his capacity as Senior Manager (Project) to file the suit. In view of the aforesaid evidence, as also the fact that no evidence in rebuttal has been led by the defendants, it is held that Sh. R.P. Gautam, Senior Manager (Project), who has filed the suit, is authorised to do so by the plaintiff-Corporation. Issue is answered accordingly.

Issue No. 2:

12. From a bare reading of the plaint it is clear that the claim of the plaintiff is based upon the agreement, which it made with defendant No. 2, on 26-7-1993. The agreement is exhibit PW2/J. Signatures on the agreement are not denied by the defendants. The document stands duly proved by the testimony of PW2- Pawan Kumar Bali, an employee of the plaintiff-Corporation. Clause 1 of the agreement are as follows:

The company shall buy 6,00,000 (six lakhs) equity shares of Rs. 10 in Pamwi at par at a price of Rs. 10 each at an aggregate sum of Rs. 60 lakhs (Rupees sixty lakhs only) from the Corporation over a period of 8 (eight) years from the date of these presents. The payment of the said amount of Rs. 60 lakhs to the Corporation shall be made by the company in 32 (thirty two) instalments at the rate of Rs. 1,87,500 (Rupees one lakh eighty seven thousand five hundred only)

each per quarter.

13. The above reproduced clause of the agreement plainly indicates that the sale of six lakhs shares had not taken place by this agreement. In fact, as per this clause, the agreement was that defendant No. 2 shall be purchasing the aforesaid number of shares over a period of eight years from the date of the agreement. Now, if the sale was not complete and it was to continue over a period of eight years, the claim for recovery of money on the plea that a portion of the sale consideration has remained unpaid is not sustainable. In other words, the plaintiff cannot seek the recovery of the money on this plea. As a matter of fact, the claim should have been for damages, based on the plea that defendant No. 2 had caused breach of the agreement for the sale of shares, inasmuch as it did not buy the entire quantity (numerical) of shares.

14. It may not be out of place to point out that shares are "goods" within the meaning of Sub-section (7) of Section 2, of the Sale of Goods Act, 1930, and therefore all the provisions of this Act are applicable. Section 5 of the Act, speaks of the manner of contract of sale. As per this provision, a contract is made by an offer to buy or sell goods for a price and the acceptance of such offer. The provision further says that the contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed. One thing is clear from the reading of Section 5 that the contract for the Sale of Goods (Shares) should be complete in the present, that is to say at the time of its making. In the instant case, the contract for sale of shares was not complete, when the writing was executed. Clause 1 of the agreement clearly said that the shares were to be bought by defendant No. 2, over a period of eight years. The writing did not say that the sale of the shares had been made in the present.

15. Property in the shares can also not be said to have passed to defendant No. 2 at the time when the agreement was executed, because the agreement specifically stated that the shares were to be bought over a period of eight years in instalments. For this reason also, the plaintiff cannot recover the price of those shares, which are still with it, and have not been purchased by defendant No. 2.

16. In view of the abovestated position, the plaintiff cannot be said to be entitled to recover the suit amount. Issue is answered accordingly.

Issue No. 3 :

17. Claim of the plaintiff is based on the plea that defendant No. 2, as per agreement, was required to pay the price of the shares in quarterly instalments and that first default was made in respect of the instalment due in December, 1997, and that no instalment was paid thereafter. Suit was filed in July, 2000, or say within three years of the first default. Therefore, the alleged claim cannot be said to be barred by time. Issue is answered accordingly.

Issue No. 4:

18. No defect was pointed out in the valuation of the suit for the purpose of court fee and jurisdiction during the course of the hearing of the suit. So, the issue is found against the defendants.

Issue No. 5:

19. No evidence with respect to this issue has been led by the defendants. So the same is found against them.

20. In view of the finding on issue No. 2, this issue is answered in favour of the defendants.

Issue No. 7:

21. No evidence with respect to this issue has been led. However, in the course of hearing of arguments, it was submitted by counsel for defendant No. 2 that during the proceedings before the Board for Industrial and Financial Reconstruction (BIFR), the plaintiff made a misrepresentation that the agreement for buying back of six lakhs shares was made by defendant No. 1, whereas in fact, the agreement for buying back the shares was executed by two promoters of defendant No. 1 in their individual capacity. There being no evidence on record in support of the submission regarding alleged misrepresentation, the issue is answered against defendant No. 2.

Issue No. 8:

22. Learned counsel for defendant No. 2 drew attention of the Court to Section 16 of the Securities Contracts (Regulation) Act, 1956, which is reproduced below:

16. Power to prohibit contracts in certain cases.--(1) If the Central Government is of opinion that it is necessary to prevent undesirable speculation in specified securities in any State or area, it may, by notification in the Official Gazette, declare that no person in the State or area specified in the notification shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of any security specified in the notification except to the extent and in the manner, if any, specified therein.

(2) All contracts in contravention of the provisions of Sub-section (1) entered into after the date of the notification issued thereunder shall be illegal.

23. The Central Government has issued notification dated 27-6-1969, under Sub-section (1) of Section 16 of the Act. By this notification, the Central Government has declared that no person in the territory to which the Act stands extended shall, save with the permission of the Central Government, enter into any contract for the sale or purchase of securities, other than such spot delivery contract or contract for cash or hand delivery or special delivery in any securities as is permissible under the said Act, and the rules, bye-laws and regulations of a recognised stock exchange. There are two provisos to this notification.

24. Learned counsel representing the plaintiff submitted that the case of the plaintiff was covered by the second proviso, which permits the ready forward contracts by a banking company and certain other institutions. Learned counsel submitted that plaintiff was a banking company, per notification dated 5-11-1976, issued by the Government of India, Department of Revenue and Banking (Banking Wing), in pursuance of Sub-clause (i) of Clause (a) and Clause (c) of Sub-section (1) of Section 9 of the Industrial Development Bank of India Act, 1964. As per this notification, the plaintiff-Corporation has been notified along with a couple of other institutions for the purposes of the aforesaid Sub-clause and clause of Sub-section (1) of Section 9 of the Industrial Development Bank of India Act, 1964. The aforesaid Sub-clause (i) of Clause (a) and Clause (c) of Sub-section (1) of Section 9 of this Act, read as follows:

9. Business of Development Bank.?(1)The Development Bank shall function as the principal financial institution for coordinating the working of institutions engaged in financing, promoting or developing industry and for assisting the development of such institutions in such manner as it may deem appropriated and may carry on and transact any of the following kinds of business, namely:

(a) granting loans and advances to--

(i) the Industrial Finance Corporation, any State Financial Corporation or any other financial institution which may be approved by the Board in this behalf, by way of refinance of any loans or advances granting to industrial concerns by such corporation or institution which are repayable within a period not exceeding twenty-five years;

(c) subscribing to or purchasing stocks, shares, bonds or debentures of the Industrial Finance Corporation, any State Financial Corporation or any other financial institution, whether within or outside India which may be approved by the Board in this behalf.

25. From a bare reading of the above reproduced Sub-Clause (i) of Clause (a) and Clause (c) of Sub-section (1) of Section 9 of the Act, it is clear that the plaintiff has been notified only for the purpose of granting loans and advances to it by the Industrial Development Bank of India and for subscribing to or purchase of its stocks, shares, bonds or debentures. The plaintiff has not been notified as a banking company by the said notification dated 5-11-1976. Therefore, argument that plaintiff having been declared as banking company, is exempted from the operation of notification of 1969, issued in exercise of the powers u/s 16 of the Securities Contracts (Regulation) Act, 1956, is of no avail.

26. Learned counsel for the plaintiff further argued that Sub-section (7) of Section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985, saves the sale of shares made by the plaintiff to defendant No. 2 from the mischief of Section 16 of the Securities Contracts (Regulation) Act, 1956. Sub-section (7) of Section 18 of the Sick Industrial Companies (Special Provisions) Act, 1985, is reproduced below for ready reference :

The sanction accorded by the Board under Sub-section (4) shall be conclusive evidence that all the requirements of this scheme relating to the reconstruction or amalgamation, or any other measure specified therein have been complied with and a copy of the sanctioned scheme certified in writing by an officer of the Board to be a true copy thereof, shall, in all legal proceedings (whether in appeal or otherwise) be admitted as evidence.

27. The provision reproduced above is in no way supports the submission of learned Counsel.

28. Sub-section (2) of Section 16 of the Securities Contracts (Regulation) Act, 1956, says that a contract made in violation of Sub-section (1) shall be illegal. The contract between the plaintiff and defendant No. 2 for the sale of the shares of defendant No. 1, is apparently in contravention of the notification dated 27-6-1969, issued under Sub-section (1) of Section 16 of the Securities Contracts (Regulation) Act, 1956, and is thus illegal, in view of the provision of Sub-section (2) of Section 16 of the same Act. Issue is answered accordingly.

Issue No. 9:

29. Learned counsel for defendant No. 2 argued that the agreement was executed at Delhi and defendant has its head office at Calcutta with no branch within the State of Himachal Pradesh and thus this court does not have the jurisdiction to entertain the suit. While countering the submission, learned Counsel for the plaintiff submitted that the instalments on account of the price of the shares were agreed to be paid at Shimla. He urged that even though it was not mentioned in the agreement itself that the instalments were payable at Shimla, defendant No. 2 had been remitting the instalments to the plaintiff at Shimla as lessee of defendant No. 1. In support of this submission, he relied upon letters exhibit PW 2/N-1 to exhibit PW 2/N-4, whereby some of the instalments towards the payment of the price of the shares were remitted by means of drafts to the defendants at Shimla. In view of these documents and applying the doctrine "debtor must seek creditor", it is held that instalments were payable at Shimla and on account of default in payment of some of the instalments, cause of action partly accrued at Shimla. Hence, the issue is answered in favour of the plaintiff.

Issue No. 10:

30. In view of the finding on issue Nos. 1 and 8, this issue is answered against defendant No. 2.

Issue No. 11:

31. It was urged that no relief having been claimed against defendant No. 1, the suit was bad on account of misjoinder. No doubt, it is true that no relief has been claimed against defendant No. 1 in the present suit nor has any cause of action been alleged to be available to the plaintiff against this defendant, but keeping in view the fact that the shares which were agreed to be sold are of defendant No.

1 and its promoters had agreed to buy them back, this defendant can be said to be a proper party. So the issue has been answered against the defendants.

Relief:

32. In view of the finding on issue Nos. 2,6 and 8, the suit is dismissed with no orders as to costs.