
(2010) 01 SHI CK 0032
In the High Court Of Himachal Pradesh
Case No : L.P.A. No. 141 of 2007

Himachal Pradesh State Industrial Development Corporation	APPELLANT
Vs	
S.C. Johnson Products Pvt. Ltd. and Another	RESPONDENT

Date of Decision : 04-01-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 226
State Financial Corporations Act, 1951 — Section 29

Citation : (2010) 01 SHI CK 0032

Hon'ble Judges : V.K. Ahuja, J;Deepak Gupta, J

Bench : Division Bench

Final Decision : Allowed

Judgement

V.K. Ahuja, J.—This is a Letters Patent Appeal filed by the appellant against the judgment passed by the learned Single Judge on 24.10.2007 in CWP No. 233 of 2001. By the said judgment, the learned Single Judge has allowed the writ petition filed by respondent No. 1 as against the appellant and respondent No. 2 and had quashed Annexures P-18 and P-19, letters dated 27.12.2000 and 19.2.2001, respectively, issued by the respondents, with further direction to the respondents to execute the conveyance deed in favour of the petitioner M/s S.C. Johnson Products Pvt. Ltd. in respect of plot No. 70.

2. Briefly stated the facts of the case are that an industrial plot bearing No. 70 at Baddi was allotted in favour of M/s Shivalik Video Communication Private Limited, vide communication, dated 7.4.1989, and possession of the plot was also handed over to M/s Shivalik Video. A sale/conveyance deed was also executed in favour of M/s Shivalik Video on 4.9.1989. M/s Shivalik Video also sought permission of respondent No. 1 to mortgage the plot with respondent No. 2 i.e. Himachal Pradesh Financial Corporation to enable them to avail financial assistance from both the respondents jointly by mortgaging plot No. 70. Respondent No. 2 (HPFC) sanctioned a term loan of Rs. 57.30 lacs in favour of Shivalik Video on 2.5.1988 for establishing an industrial unit at Baddi. The

Company availed of the loan of Rs. 54,80,860/-. A loan agreement was also entered into in between Shivalik Video and respondent No. 2/HPFC on 7.10.1989. Respondent No. 2 initiated action u/s 29 of the State Financial Corporation Act, 1951 against M/s Shivalik Video for realization of the outstanding loan and also took over the possession of the mortgaged/hypothecated assets of M/s Shivalik Video on 29.11.1994.

3. The assets of M/s Shivalik Video were put to sale and the petitioner Company, which was interested to purchase a plot, entered into correspondence with respondent No. 2. Respondent No. 2, vide its communication, dated 17.9.1996, informed the petitioner Company about the total area of the plot being 6994 square meters and the total constructed area is 12757.75 square feet and that the sale shall take place strictly on "as is where is" basis. The petitioner company was also advised to inspect the assets. A draft of Rs. 7,80,000/- was sent to the Managing Director of respondent No. 2 Corporation informing that they were interested in purchasing the unit and made the offer as under:

- (i) Rs. 78.00 lacs payable as sale consideration
- (ii) Rs. 7.34 lacs as unearned increase money to HPSIDC, if applicable.
- (iii) Rs. 1.50 lacs as maintenance charges due to HPSIDC, if applicable.

4. Respondent No. 2 informed the petitioner Company that the offer made by them was acceptable and the petitioner Company was directed to deposit the sale proceeds of Rs. 70.20 lacs in addition to Rs. 7.80 lacs already deposited by draft. The petitioner Company deposited the amount by way of drafts of Rs. 45.00 lacs and Rs. 30.00 lacs. An intimation was sent by respondent No. 2 to respondent No. 1 informing that the purchaser Company, vide letter, dated 10th July, 1997, had deposited the entire sale proceeds of Rs. 78.00 lacs with the Corporation and the possession of the assets be handed over to the purchaser. The petitioner Company took over the possession of the Unit on 22.7.1997.

5. Respondent No. 1 Corporation sent a communication to the petitioner Company on 22nd September, 1999 seeking certain details with regard to unearned increase etc. followed by another letter, dated 19.11.1999. The petitioner Company informed respondent No. 1 Corporation that it has already paid the entire dues as advised by respondent No. 2 and have also taken over the assets on 22.7.1997. The petitioner Company also wrote letter to respondent No. 2 on 18.9.2000 to get executed the sale deed in their favour. Respondent No. 1 sent a legal notice to the petitioner Company on 24th December, 1999 whereby the unearned increase/annual maintenance charges were demanded from the petitioner Company amounting to Rs. 27,73,728/- on the basis of Clause 2(xi)(b) of the sale/conveyance deed executed in favour of M/s Shivalik video and respondent No. 1 Corporation. This was followed by other letters, dated 27.12.2000 and 19.2.2001, which communications were replied by the petitioner Company. Thereafter, the petitioner Company filed the present writ petition for quashing of the two letters issued by respondent No. 1 Corporation, dated

27.12.2000 and 19.2.2001, Annexures P-18 and P-19, respectively.

6. The main plea taken by the petitioner in the writ petition was that according to the correspondence that took place in between the petitioner Company and respondent No. 2 (HPFC), the sale consideration fixed was at Rs. 78.00 lacs only and there was no agreement entered into in between the parties for the payment of a sum of Rs. 7.34 lacs as unearned increase money payable to respondent No. 1/HPSIDC. It was submitted that all along the sale consideration mentioned was Rs. 78.00 lacs, which was duly paid by the petitioner Company. It was submitted that there was no agreement entered into in between the petitioner Company and respondent No. 1 for payment of Rs. 7.34 lacs as unearned increase money and, therefore, the demand made vide letters dated, 27.12.2000 and 19.2.2001, by respondent No. 1 is illegal and they are not entitled to recover this amount. It was also submitted that once the sale consideration has been paid by the petitioner Company, they are entitled to the relief that the sale deed be executed in their favour and accordingly, the writ petition was rightly allowed by the learned Single Judge.

7. The submissions made by the learned Counsel for the appellant, challenging the findings of the learned Single Judge, were that though the sale consideration was fixed as Rs. 78.00 lacs, but all along, it was clear to the petitioner Company that they were liable to pay a sum of Rs. 7.30 lacs as unearned increase money to the appellant/HPSIDC in accordance with the agreement entered into in between the previous allottee M/s Shivalik Video and the appellant and since the petitioner Company had purchased the plot which was already allotted to M/s Shivalik Video, it was bound by the agreement entered into with the previous allottee, which fact was also clear to the petitioner Company as per the correspondence that took place in between the petitioner Company and appellant.

8. During the course of arguments, it was pointed out that there was no dispute in regard to the payment of the maintenance charges due to the HPSIDC and the dispute is only in regard to the unearned increase money, as mentioned above. Thus, it was submitted after making a reference to the correspondence in between the parties that this amount was payable to the HPSIDC and until and unless this amount was paid, the petitioner Company was not entitled to the execution of the sale deed in their favour. To support his submissions, the learned Counsel for the appellant had referred to the relevant documents, which shall be referred below for arriving at a just conclusion.

9. On the other hand, the learned Counsel for the petitioner Company has strenuously argued that all along, the correspondence shows that the sale consideration was fixed at Rs. 78.00 lacs, which had been paid by the petitioner Company and there was no agreement for payment of any unearned increase money and as such the petitioner Company was rightly held entitled to the relief claimed by them. The main question to be considered, therefore, is in regard to the plea if the petitioner Company was also liable to pay the unearned increase money or not.

10. During the course of hearing, a query was put up by the Court as to whether the writ jurisdiction can be exercised by the court in regard to the dispute in between the parties which can be termed as contractual or commercial transaction and not the statutory powers of the State. In regard to this, the submissions made by the learned Counsel for the appellant were that this was a commercial transaction and the writ jurisdiction cannot be exercised, though no objection had been taken that there was no writ jurisdiction of this Court either in the reply filed by them or during the course of hearing before the learned Single Judge. However, this point was legal and a query was put up by this Court during the course of hearing.

11. The learned Counsel for the petitioner Company had relied upon the decision of the Apex Court in this regard in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, The question was considered by the Apex Court as to the writ jurisdiction to be exercised in cases involving serious disputed questions of fact, which require consideration of evidence. It was observed that the court will not normally exercise its jurisdiction under Article 226, when it requires consideration of evidence, which is not on record. The question was considered at length by their Lordships and it was held in para 27 as under:

From the above discussion of ours, the following legal principles emerge as to the maintainability of a writ petition:

(a) In an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

(b) Merely because some disputed questions of fact arise for consideration, same cannot be a ground to refuse to entertain a writ petition in all cases as a matter of rule.

(c) A writ petition involving a consequential relief of monetary claimis also maintainable.

12. The question as to the contractual obligation of State or its instrumentality was also considered and it was held that this question is no longer res integra and has been settled by large number of judicial pronouncements of the Supreme Court. It was held that the High Court can intervene under Article 226 of the Constitution of India if the State or its instrumentality acts in contract. an arbitrary manner even in the matters of question qua the

13. A plea was also raised as to whether maintainability of the writ can the be considered once the writ petition has been admitted for hearing. This question has been considered by a Division Bench of this Court in, titled M/s Suraj Industries Limited v. Ravi Dutt and Ors. LPA No. 83 of 2008 decided on 15.9.2009, wherein it was held by this Court that the mere fact that the writ petition has been admitted for hearing does not debar this Court from considering this question when the writ petition comes up for final hearing. The

observations made by their Lordships in regard to the exercise of writ jurisdiction under Article 226, in such circumstances, were considered by the Apex Court in *ABL International Ltd. (supra)*. The observations made in para 28 are relevant and may be reproduced below:

However, while entertaining an objection as to the maintainability of a writ petition under Article 226 of the Constitution of India, the court should bear in mind the fact that the power to issue prerogative³ writs under Article 226 of the Constitution is plenary in nature and is not limited by any other provisions of the Constitution. The High Court having regard to the facts of the case, has a discretion to entertain or not to entertain a writ petition. The Court has imposed upon itself certain restrictions in the exercise of this power. See *Whirlpool Corporation v. Registrar of Trade Marks*. And this plenary right of the High Court to issue a prerogative writ will not normally be exercised by the Court to the exclusion of other available remedies unless such action of the State or its instrumentality is arbitrary and unreasonable so as to violate the constitutional mandate of Article 14 or for other valid and legitimate reasons, for which the Court thinks it necessary to exercise the said jurisdiction.

14. Another question raised and considered by their Lordships was as to why they should not drive the appellants to a suit. It was observed by their Lordships that the claim of the appellants was rejected by the respondent in the year 1994. The respondent challenged the basis of rejection by way of writ petition in the year 1996. The objection as to the maintainability of the petition was rejected by the High Court by its judgment dated 15.5.1997. The case was being considered in the end of the year 2003 and it was held that we do not think it proper to relegate the parties to a suit, which would be doing injustice to the appellants. Their Lordships had followed an earlier decision in making these observations.

15. The above decision clearly applies to the facts of the present case and keeping in view the fact that the petitioner Company has been litigating since the year 2001 and the present appeal is being decided in the year 2009, we are of the view that the petitioner Company cannot be directed to seek the remedy before the Civil Court, applying the above decision of the Apex Court, and as such, this Court can look into the question of the letters issued by the respondents and, therefore, this plea is being considered in favour of the petitioner Company.

16. Coming to the dispute in regard to the question as to whether the petitioner Company was entitled to the relief for quashing of two letters Annexures P-18 and P-19 mentioned above, the sequence of events and the correspondence that took place in between the parties has to be referred to arrive at a conclusion.

17. The first document worth consideration is the agreement entered into in between HPSIDC and M/s Shivalik Video, the previous allottee, on 4th day of September, 1989. Clause relevant for the present discussion is Clause (xi), which reads as under:

a) The vendee shall not sell, lease out, transfer, assign or otherwise part with the possession of the plot or building erected thereon either in whole or part except with the prior written approval of the Managing Director of the vendor/ Corporation. The Managing Director of the Corporation shall have the right to refuse such requests in his absolute discretion.

In the event of such consent being given the Corporation may impose such terms and conditions as it deemed fit and the Corporation shall be entitled to claim and recover a portion of the unearned increase in the value (i.e., the difference between the final price paid and market value) of the Industrial Plot at the time of sale, transfer, assignment, or parting with the possession. The amount to be recovered will be 50% of the unearned increase and the decision of the Managing Director of the Corporation in respect of determination of market value shall be final and binding;

b) The vendee may, with the prior written consent from the Corporation, mortgage his rights in the Industrial plot to such financial institutions as may be approved by the Corporation in its absolute discretion. In the event of sale or fore-closure of the mortgaged property, the Corporation shall be entitled to claim and recover the 50% of the unearned increase in the value of the Industrial plot as aforesaid, and the amount of the Corporation's share of the said un earned increase shall be a first charge having priority over the said mortgage or charge;

18. The earliest letter on record is Annexure P-4 written by the petitioner Company to the Managing Director of the Himachal Pradesh Financial Corporation on which, the date is not mentioned, but it was in reply to a letter, dated 17.9.9 (year not clear), in which the petitioner Company had written as under:

We shall be interested in making down payment of the balance of the total consideration by 31st March, 1997. We are sending a demand draft of Rs. 7.8 Lakhs (Rupees seven lakhs eighty thousand) as 10% earned money. It is also to be clarified that electricity, water charges shall be on our account and sales tax liability if any will be on a/c of HPFC/HPSIDC. The unearned increase (10%) shall be on our a/c & maintenance charges if any shall be on our a/c. As per discussion aforesaid amount works out to Rs. 7.34 + 1.50 lacs - Rs. 8.84 lacs only if applicable.

19. A copy of the above letter written by the petitioner Company was also sent to the Managing Director of respondent No. 1 HPSIDC, which clearly shows that the petitioner was aware that for finalizing the deal, the HPSIDC was also concerned. This also answers the plea raised by the learned Counsel for the petitioner Company that they had no connection with the HPSIDC, but the correspondence, which shall be referred herewith, will clearly show that the petitioner Company was aware that some role was to be played by the HPSIDC, whose consent was also required to finalize the deal. This letter answers the plea raised by the learned Counsel for the petitioner Company, which falls squarely on the ground.

20. The next letter Annexure P-5 is dated 20.3.1997 written by the petitioner

Company to respondent No. 2 in which also the petitioner had reiterated as under:

That our offer is as follows:

1. Rs. 78.00 lacs as sale consideration.

(II) Rs. 7.34 lacs unearned increase money to HPSIDC if applicable.

(III) Rs. 1.50 lacs as maintenance charges due to HPSIDC if applicable.

20. Thereafter, there is a reply of respondent No. 2 vide their letter to the petitioner Company that they have accepted his offer of Rs. 78.00 lacs for the purchase of above assets subject to the approval of the Board of Directors of the HPSIDC. The petitioner Company was also advised to deposit the balance sale proceeds of Rs. 70.20 lacs in addition to Rs. 7.80 lacs already deposited by them. This letter also shows that the petitioner Company was aware of the fact that the deal is to be approved by the Board of Directors of the HPSIDC i.e. the present appellant. The mere fact that in this letter it has been mentioned that the sale consideration was Rs. 78.00 lacs is not sufficient to hold that the other stipulations, to which the petitioner had agreed vide letter referred to above they were not bound by them. Thereafter there is a letter Annexure P-8/A, written by the HPFC to the petitioner Company accepting their offer of Rs. 78.00 lacs which has been approved by the HPSIDC. Thereafter, respondent No. 2 wrote a letter to respondent No. 1 that the possession be handed over to the petitioner Company since the entire sale proceeds of Rs. 78.00 lacs have been deposited with them. A letter was also written by the HPSIDC, dated 22.9.1999, (Annexure P-10), to the petitioner Company, the relevant portion of which reads as under:

It has come to the notice of this Corporation that you have purchased the assets of M/s Shivalik Video Communication Pvt. Ltd., plot No. 70, Industrial Area (SFS), Baddi, Distt. Solan, HP directly from HP Financial Corporation, Shimla.

Therefore, you are requested to inform this Corporation of the exact amount deposited by you with the HPFC before taking over possession of the said assets. It may also be informed whether the unearned increase or other dues pertaining to the abovesaid plot payable to this Corporation as per approval conveyed by HPSIDC were demanded from you by the HPFC or not.

21. Respondent No. 1 had also written a letter to the petitioner Company, dated 19.11.1999, (Annexure P11), to inform them if the petitioner Company has deposited the unearned increase payable to the Corporation as per the approval conveyed by respondent No. 1. A reference can be made to the letter, dated 26.6.2000, (Annexure P-12), written by the petitioner Company to respondent No. 1 informing them that they have paid the entire amount and that the assets were also handed over to them on 22nd July, 1997. A letter was also written by the petitioner Company, dated 18.9.2000, (Annexure P-13), to the HPFC informing them that since they have been given the possession and amount has also been paid by them, date for the execution of the sale deed be conveyed to

them. Thereafter, vide letter, dated 30.9.2000, (Annexure P-14), respondent No. 2 informed the petitioner Company to contact respondent No. 1/HPSIDC to execute the sale deed. The reply sent by the petitioner Company to respondent No. 2, dated 12.10.2000, (Annexure P-15), is that the plot was handed over to them by the HPFC and the entire correspondence was done with the HPFC. The petitioner Company again wrote a letter, dated 7.12.2000, (Annexure P-16), to respondent No. 2 asking for the registration of the sale deed. There is another letter by respondent No. 1, dated 24.12.1999, (Annexure P-17), written to the petitioner Company asking for the payment of unearned increase money amounting to Rs. 7.34 lacs. Thereafter, two impugned letters issued by the respondents are on the record, which are sought to be quashed.

22. Annexure P-18 is the letter written by HPSIDC, dated 27.12.2000, to the petitioner Company in regard to the non-payment of the dues as unearned increase. Annexure P-19 is another letter written by the HPSIDC, dated 19.2.2001, reiterating the covenants in the agreement executed in favour of M/s Shivalik Video, referred to above, in regard to the unearned increase. This amount was assessed at Rs. 27,73,728/-, which was demanded by the respondent HPSIDC from the petitioner Company.

23. It is clear from the above discussion of all the documents placed on record that the petitioner Company was not an original allottee but it had agreed to purchase the plot after the possession of the plot, originally allotted in favour of the previous allottee, was taken and the steps were taken for the resale of the plot to the petitioner when the petitioner Company agreed and made offer. Once the petitioner Company was not an original allottee, but it was purchasing the plot on re-allotment basis, it cannot be said that they had not gone through the terms and conditions of the original allotment made in favour of the previous allottee and the agreement entered into by the previous allottee with respondent No. 1/HPSIDC. In case the petitioner had gone through the agreement in question, which it was required to go through, it will be clear that the petitioner was liable to the payment of unearned increase of the plot, the value of which was tentatively fixed at Rs. 7.00 lacs, which was subsequently fixed at Rs. 27,73,728/-. In the original offer made by the petitioner Company, the said Company agreed to pay the sale consideration of Rs. 78.00 lacs plus unearned increase and other charges. The mere fact that subsequently the words "if applicable" were written by the petitioner does not lead to the inference that the petitioner Company was not liable to make payment once in the original offer, it had agreed to pay the unearned increase. The petitioner Company entered into correspondence with respondent No. 1, sent copies of letters to respondent No. 2 and in the communications, referred to above, it was clear to the petitioner that the deal was subject to the approval of respondent No. 1 i.e. HPSIDC. The petitioner Company cannot take up the plea subsequently that it is not concerned with the HPSIDC once it had been sending letters to the HPSIDC and was informed that the deal was subject to the confirmation by the Board of Directors of the HPSIDC. Once it had agreed to pay the sale consideration and unearned

increase in the original offer made by it, the petitioner Company cannot wriggle out of the offer subsequently on the plea that since it had deposited the sale consideration and the demand was made from the petitioner Company only of the sale consideration and the possession has also been delivered to the petitioner Company, it is not liable to pay the unearned increase. The sale consideration was paid by it, as agreed to, and accordingly, the respondent gave it the possession of the plot also and the petitioner Company has been enjoying the fruits of the plot also. However, before the execution of the sale deed, it had to comply with the other conditions made in the offer given by it and it cannot wriggle out of these conditions or offer made on the plea that the sale consideration has been paid and it was not liable to pay any other amount to which it had itself agreed at the time of initial offer made by it.

24. Coming to the findings recorded by the learned Single Judge, it had been concluded that the basis of claiming the unearned increase and maintenance charges was the conveyance deed executed between M/s Shivalik Video Communication Private Limited and respondent No. 1 Corporation on 4.9.1989, to which the petitioner Company was not a party. Therefore, the learned Single Judge had held that whatever conditions might have been incorporated in the conveyance deed were binding on the parties to the conveyance deed alone. Thus, it was held that the unearned increase could not be demanded from the petitioner Company at all by the respondents.

25. We have already discussed above that the petitioner Company must have gone through the conveyance deed executed between the previous owner and respondent No. 1 Corporation and it is true that the petitioner Company was not a party to the said conveyance deed. However, the petitioner Company was not the original allottee but it was the subsequent allottee on cancellation of the plot in favour of the original allottee and we have held above that the petitioner Company must have gone through the conveyance deed and the conditions provided therein. Moreover, we have already referred to the documents in which the petitioner Company had agreed to pay the unearned increase and maintenance charges, as mentioned above. There is no dispute in regard to the maintenance charges since, as per the arguments advanced at the hearing, it appears that the said amount has been paid by the petitioner Company. In regard to the unearned increase, once the petitioner Company had agreed to pay the unearned increase, as discussed above from the letters exchanged in between the parties, the petitioner Company was bound to honour the said commitment and accordingly, it cannot be said that the basis of the claim of the petitioner Company was only the conveyance deed, but it is also the correspondence entered in between the parties in which the petitioner Company had agreed to pay the unearned increase.

26. It follows from the above discussion that the petitioner Company was liable to pay the unearned increase which had been offered by them and accordingly we are not in agreement with the findings recorded by the learned Single Judge

in this regard.

27. It is true that the State has to fulfill its contractual liability to execute the sale deed in favour of the petitioner Company, but the petitioner Company is entitled to the execution of the sale deed if they fulfill all the conditions in accordance with the offer made by them and agreed to in between the parties. It would have been more advisable for the respondents to have entered into fresh agreement with the petitioner Company to avoid such disputes but once they did not enter into any fresh agreement, the correspondence that took place in between them had to be considered and it follows that the petitioner had offered some other amount also, apart from the sale consideration and until and unless, the petitioner Company paid those amounts, it cannot be said that it was entitled to the execution of the sale deed in its favour.

28. Accordingly, the findings recorded by the learned Single Judge quashing the letters, dated 27.12.2001 and 19.2.2001 (Annexures P-18 and P-19) issued by the appellant to the petitioner Company are set aside. The petitioner Company shall be entitled to the execution of the sale deed in its favour, subject to the payment of unearned increase. The appeal filed by the appellant is allowed accordingly. However, there is no order as to costs.