
(2009) 04 PAT CK 0077
In the Patna High Court
Case No : CWJC No. 15538 of 2008

Jamshedpur Cement Ltd. and Ideal Vanijya Private Limited	APPELLANT
Vs	
The Bihar State Credit and Investment Corporation Limited and The Assistant Manager OTS, Bihar State Credit and Investment Corporation Limited	RESPONDENT

Date of Decision : 16-04-2009

Acts Referred:

Citation : (2009) 04 PAT CK 0077

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—Petitioner No. 1 is the Company incorporated under the provisions of the Indian Companies Act, 1956. Petitioner No. 2 is a Company to whom petitioner No. 1 has assigned its debt. Petitioner No. 1 had taken substantial term loan from Bihar State Credit and Investment Corporation Limited (hereinafter referred to "as BICICO"). BICICO is a financial corporation established under the State Financial Corporation Act, 1951.

2. Petitioner No. 1 had set up a mini cement plant with the finance made available at Jamshedpur. For various reasons, the plant could not operate economically enough to pay back to BICICO. Petitioner No. 1 was a defaulter. BICICO came up with BICICO ONE TIME SETTLEMENT (TERM LOAN) SCHEME, 2006. The major distinction between this scheme and earlier scheme for One Time Settlement was that once the settlement amount was calculated and communicated, the Unit had an option to either pay it directly or take a loan from a third party and pay to BICICO. If third party happens to be a nationalized Bank or a designated authority as under the Scheme then BICICO was bound itself to enter into a tripartite agreement for facilitating loan from the third party to the unit for liquidation of the BICICO due under One Time Settlement. The Scheme has been appended as Annexure 1 to the writ petition.

3. Clause III(i) of the Scheme deals with "The Scheme". The relevant part thereof is quoted hereunder:

OTS Amount

(i) "In all such cases as given at (a), (b), (c) and (d), the OTS amount shall be the principal outstanding as on date plus a one time concessional rate, of interest at 10% of Principal outstanding. Other charges for legal cases, advertisement etc. as prescribed by BICICO time to time will also be payable with the above OTS amount. Relevant papers as required by BICICO for availing of OTS Scheme-2006 (Term Loan) is mandatory. No refund shall be allowed.

Facility for arrangement of fund for the OTS Scheme-2006.

BICICO will permit and follow up with the Bank/recognized institution as identified by the borrowing unit for arrangement of fund for settlement of dues and it will allow Tripartite Agreement with BICICO. Borrowing unit and the Bank/recognized institution and the security documents will be given to such Bank/recognized institution on final settlement of dues.

4. From the above quoted part of the Scheme, two things are clear. First what would be the OTS amount is not calculated by the unit rather it is to be calculated and communicated by BICICO to the unit concerned. The second is that in case the unit so wants, BICICO has bound itself to persuade Bank or recognized institution to grant loan to the unit and would agree to enter into a tripartite agreement in this regard. This would show that that was depend on the unit to require BICICO to intervene in this matter or not for the purposes of the tripartite agreement. Once the amount of OTS payable under this Scheme was identified and quantified by BICICO then there is a repayment Schedule with consequential liability. This OTS Scheme, it is not in dispute, was open for subscription from 15.5.2006 to 15.11.2006, which was extended upto 31.3.2007. Thus upto 31.3.2007 any unit could make an application for availing of the benefit under the said Scheme. It is not in dispute that by letter dated 21.6.2006 (Annexure 2), BICICO informed petitioner No. 1 that BICICO had launched the Settlement Scheme and the unit was informed that BICICO had tentatively found the petitioner- Company to be falling under category liquidation and tentatively worked out the OTS amount at Rs. 81.60 lakhs. It also clearly mentions that the amount mentioned (Rs. 81.60 lakhs) is tentative and final amount would be worked out after submission of application along with 10% upfront charges. This was responded to on behalf of petitioner No. 1 by saying that the Company was ready to avail the OTS Scheme on payment of the amount, so demanded by the Company or its nominee. Petitioner demanded the calculation of the OTS amount. This was letter dated 21st June, 2006 (Annexure 3). Having not received any response, again petitioner No. 1 as well as petitioner No. 2 on 6th July, 2006 wrote separate letter to BICICO. Petitioner No. 1 stated that the petitioner- Company had assigned its debts to petitioner No. 1 by registered deed. On behalf of petitioner No. 1, petitioner No. 2 was paying an upfront amount of Rs. 8 lakhs under the Scheme and for availing the Scheme. This was duly acknowledged by petitioner No. 2. The bank draft of Rs. 8 lakhs was accordingly made over along with this letter to the respondent- BICICO.

Petitioner No. 2 again filed the required paper at that stage but it is not in dispute that nothing was communicated by the BICICO to the petitioners. On behalf of petitioner No. 1, again a reminder was sent to BICICO on 24th July, 2008 (Annexure 6) requesting for communication of final calculation so that necessary documentation could be done. Having received no response from BICICO and petitioner No. 1 being disparate to get out of the debt trap was left with no option but to approach this Court for a direction to the respondent-BICICO for communicating to its final amount, which was payable under OTS Scheme (Term Loan), which BICICO failed to do and then to grant the said facility to petitioner No. 1 or assignee of its debt (Petitioner No. 2).

5. BICICO has appeared and filed a counter affidavit. They have taken four principal stands. First is that the scheme quantified the amount payable under the Scheme and the petitioner, not having paid the entire settlement amount, cannot make any grievance and secondly, now a plea is being taken that BICICO though had received the payment of 10% upfront of Rs. 8 lakhs by demand draft from petitioner No. 2, it does not recognize or accept the status of petitioner No. 2. Accordingly payment made by demand draft in favour of BICICO by petitioner No. 2 on behalf of petitioner No. 1 is not a recognized payment under the Scheme. Its third stand is that Tripartite Agreement, which was to be entered, was not entered into by the unit with permission of BICICO and as such the arrangement as between petitioner No. 1 and petitioner No. 2 could not be accepted by BICICO as a valid arrangement. Lastly, it was submitted that the period of the Scheme having expired, the benefit thereunder cannot be extended.

6. Petitioner does not want to file a rejoinder to the counter affidavit.

7. With the consent of the parties, the writ petition has been heard at length for disposal at this stage.

8. First issue to be decided is whether the OTS amount was quantified and known to the petitioner, which the petitioner under the Scheme was bound to pay. A reference to the OTS amount, as defined under the Scheme would clearly show out otherwise. The Scheme itself contemplated that apart from the principal outstanding there were other charges, which were includable in that as would be prescribed by BICICO from time to time. Thus under this very definition, the amount had to be determined by BICICO and consequently communicated to the unit by BICICO. It is wrong to suggest that the amount was known to the petitioner. This finding of this Court is affirmed by the BICICO in its own letter dated 21.6.2006 (Annexure 2). That letter has in no uncertain term made it clear as to what was the implication in the Scheme. That letter clearly in no uncertain term says that tentatively the liability is Rs. 81.60 lakhs and specifically mentioned that the final amount would be worked out after petitioner submits the form accepting to be under the Scheme along with payment of 10% of the tentative amount, as aforesaid. This, in my view, in no manner of doubt says that the amount had to be finally arrived at and fixed and communicated by BICICO to the petitioner and there is no gain saying that the petitioner was

aware of the said amount and did not pay the same. This, in my view, is a pretence of an excuse on the part of BICICO to deny the benefit to the petitioner. Further petitioner paid 10% upfront requested for final calculation. All that remained un responded. Nowhere in the counter affidavit it is stated that any communication was made by BICICO to either petitioner No. 1 or petitioner No. 2 that the payment, as made by them purporting to be under OTS Scheme for availing the Scheme was not correct or not acceptable or not liable to be acted upon. Nothing has been brought on record in that regard.

9. On the contrary once payments were made on 6.7.20-06 within the valid period of OTS, they were happily appropriated by BICICO and the demand draft was duly encashed. Thus, the first issue is decided in favour of the petitioner and against the BICICO.

10. Coming to the second issue, that BICICO does not recognize petitioner No. 2. In my view, that is wholly irrelevant. It is not for the BICICO to recognize petitioner No. 2 nor that is relevant for the present purposes. What was material was that payment had to be made on behalf of a unit claiming to avail the benefit under the Scheme. Undisputedly and unequivocally both petitioners wrote to BICICO that payment was being tendered on behalf of petitioner No. 1 for availing the benefit under the Scheme. BICICO merrily accepted the payment and encashed the draft. Now, when its action was being challenged it is turning around and negating the whole transaction after having taken advantage thereof. It is well settled that a party cannot approbate or reprobate at the same time as has been held in the case of Nagubai Ammal and Others Vs. B. Shama Rao and Others, and in particular para 23 thereof it was held therein that a party cannot, after taking advantage under an order be heard to say that it is invalid and ask to set it aside, or to set up to the prejudice of persons who have relied upon it a case inconsistent with that upon which it was founded.

11. It was open to the BICICO to reject and not to accept the draft, as made available to it. It did not do so. Having received the letter, it was open to BICICO to repudiate the entire matter immediately by communicating to the petitioner. It did nothing rather it accepted the payment and appropriated it. Payment was made based on certain conditionality. By appropriating the payment.

12. BICICO is bound by the conditionality contained therein. Whether BICICO recognizes petitioner No. 2 or not is not relevant.

13. As stated above, what is relevant is payment made on behalf of petitioner No. 1, which it was done. This issue is accordingly decided against BICICO.

14. The third issue is with regard to Tripartite Agreement. The argument on behalf of BICICO is equally misconceived. A reference to clause, quoted above, would show that the Tripartite Agreement was at the option of the unit i.e. if the unit so wanted to be financed by a nationalized Bank then BICICO would be obliged to enter into Tripartite Agreement but it was the option of the unit, nevertheless, which option unit did not exercise. It did not require BICICO to

enter into any Tripartite Agreement. BICICO cannot force itself into a tripartite agreement without request from the petitioner. There being no request, this clause remained inoperative and as such the arguments on behalf of BICICO are wholly misconceived.

15. Coming to the last issue that the period for making payment is over, again this submission is wholly misconceived on two counts, firstly, as per the Scheme, a period is fixed for making the initial payment for applying under the Scheme. That period, as noted above, was extended upto 31.3.2007. Petitioner undisputedly made application with requisite amount within that period. Therefore, his application was within the time. Now it was for respondent-BICICO to act and communicate the figure on which the payment Schedule was dependent but for some undisclosed internal problem it has failed to communicate the final figure, nor did it reject petitioner's application. Thus, the final repayment schedule is yet to take effect. If depends on BICICO's action and it does not lie on a State instrumentality like BICICO to take such a plea.

16. I cannot do better to quote the words of Chief Justice Chagla, as noted in the case of All India Groundnut Syndicate Ltd. Vs. Commissioner of Income Tax, Bombay City, :

But the most surprising contention is put forward by the Department that because their own officer failed to discharge his statutory duty, the assessee is deprived of his right which the law has given to him under Sub-section (2) of Section 24. In other words, the Department wants to benefit from and wants to take advantage of its own default. It is an elementary principle of law that no person - we take it that the Income Tax Department is included in that definition can put forward his own default in defence to a right asserted by the other party. A person cannot say that the party claiming the right is deprived of that right because "I have committed a default and the right is lost because of that default.

17. A similar situation arose before the Apex Court in the case of Mangalore Chemicals and Fertilisers Ltd. Vs. Deputy Commissioner of Commercial Taxes and others, . In that case Sales tax exemption was notified by the State of Karnataka for a fixed period. The petitioner made an application. The application remained pending because of some internal departmental problem. Later the petitioner was told that sorry we ought to have granted exemption but the period of five years having been over, the exemption cannot be granted now. The Apex Court noted the contention with approval and in para 11 their Lordships have noted thus:

There is no dispute that appellant had satisfied these conditions. Yet the permission was withheld- not for any valid and substantial reason but owing to certain extraneous things concerning some inter-departmental issues. Appellant had nothing to do with those issues. Appellant is now told "We are sorry. We should have given you the permission. But now that the period is over, nothing can be done. The answer to this is in the words of Lord Denning: "Now I know that a public authority cannot be estopped from doing its public duty, but I do

think it can be estopped from relying on a technicality and this is a technicality" (see *Wells v. Minister of Housing and Local Government* (1967) 1 WLR 1000 at p. 1007).

18. Francis Bennion in his "Statutory Interpretation", 1984 edition, says at page 683:

Unnecessary technicality : Modern courts seek to cut down technicalities attendant upon a statutory procedure where these cannot be shown to be necessary to the fulfillment of the purposes of the legislation.

19. Lastly I may refer to the case of *Hindustan Sugar Mills Vs. State of Rajasthan and Others*, wherein their Lordships have held that the Central Government will not try to shirk its legal obligation by resorting to any legal technicalities, for we maintain that in a democratic society governed by the rule of law, it is the duty of the State to do what is fair and just to the citizen, and the State should not seek to defect the legitimate claim of the citizen by adopting a legalistic attitude but should do what fairness and justice demand.

20. Here in the present case, it is not in dispute that the petitioners did what was expected of them. They were not told that they were required to do something more or what they have done was insufficient. They waited. They reminded and then they approached this Court. Now various technical pleas are being taken by the BICICO, which are all misconceived, as noted above. The result is that the petitioner is entitled to the relief, as prayed for.

21. Let a mandamus issue to BICICO to immediately give final figure to the petitioners for payment, as per the Schedule provided under the Scheme and upon completion of the formalities in that regard and on complete payment in that regard as per Schedule, treat the petitioners' account to be finally settled.

22. The Writ petition with the aforesaid observation and direction is accordingly allowed.