
(2007) 06 SHI CK 0042
In the High Court Of Himachal Pradesh

Jerath Electronics and Allied Industries Private Ltd.	APPELLANT
Vs	
State of H.P. and Others	RESPONDENT

Date of Decision : 12-06-2007

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2007) 2 ShimLC 501

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—The petitioner-company is a private limited company incorporated under the Companies Act having its head office at Shogi, Tehsil and District Shimla, H.P. The petitioner-company is duly registered for manufacturing the components of key pads vide Small Scale Industry Certificate dated 13.12.1989. The petitioner-company had entered into agreement for subsidies with the respondent No. 3 on 28.3.1989. It will be pertinent to reproduce para 8 of the agreement as under:

On the said application and subsequent representation made by the Entrepreneurs, the Government has sanctioned the Central subsidy of Rs. 15,27,500/- and the Corporation has agreed to pay the same on behalf of the Government to the Entrepreneurs on executing necessary documents as hereinafter appearing and creating fixed assets to the tune of Rs. 61,10,000/-.

2. The petitioner was entitled to central investment subsidy based on various capital investments made by the petitioner. It is averred in the petition that the company was entitled for Rs. 15,27,250/- as central subsidy as per the 67th meeting of the State Level Committee held on 8th March, 1989. The company was released a sum of Rs. 9,42,000/- through respondent No. 3 upto August, 1989 but the balance of Rs. 5,85,250/- was not released in favour of the company. Since the petitioner-company was not released a sum of Rs.

5,85,250/-, it had to raise a loan from the respondent No. 3 @ 20.5% rate of compound interest. It is averred that the petitioner had to pay Rs. 1.46 lakhs as 25% margin money.

It appears from the record that the petitioner had raised loan of Rs. 7.31 lakhs from the respondent No. 3. The subsidy amount of Rs. 5.85 lakhs was finally released in favour of the petitioner on 23.8.1997. The petitioner had earlier filed CWP No. 803/1998 which was withdrawn with liberty to file fresh petition as and when occasion arises raising all such grounds raised in the petition vide order dated 1.12.1998.

3. Mr. B.N. Misra, Advocate appearing on behalf of petitioner-company as strenuously argued that on the basis of the promise held out to the petitioner more particularly as contained in para 8 of the agreement of Annexure P-3 read with Annexure P-3/A dated 21st July, 1989, the petitioner was entitled to central subsidy amounting to Rs. 15,27,250/-. He then submitted that out of Rs. 15,27,250.00, only a sum of Rs. 9,42,000/- was disbursed and the remaining amount was disbursed in the year 1997 and in between to run the unit the company had to borrow a sum of Rs. 7.31 lakhs from the respondent No. 3- corporation at exorbitant rate of interest.

4. The learned Advocate General has submitted that the petitioner was entitled to central subsidy in proportion to the creation of assets by the petitioner-company. He has also relied upon the judgment of the Hon'ble Supreme Court in case *Umesha Textile and another v. Union of India and Anr.* decided on 5th December, 1995 (Annexure R-1).

5. Mr. Bimal Gupta, Advocate appearing on behalf of respondent No. 3 has submitted that the corporation was acting as an agent for the disbursement of central investment subsidy under the Central Investment Scheme and the subsidy is first sanctioned by the State and thereafter funds of capital subsidy are placed at the disposal of the corporation out of which subsidy used to be released to the eligible entrepreneurs like the petitioner-company.

6. I have heard the parties and perused the record.

7. The petitioner-company had set up an industry at Shogi after getting it registered in accordance with law. The petitioner had been assured that it will be entitled to central subsidy amounting to Rs. 15,27,250/- as per the decision of the Central Government. The petitioner-company had been released a sum of Rs. 9,42,000/- in the year 1989 but the remaining amount of Rs. 5,82,250/- has been released in favour of the petitioner-company in the year 1997. The stand taken by the respondents-State is contradictory. The stand of the State is that since the petitioner had not created assets, the proportionate central subsidy could not be released. It is also the stand of the State that it was only after the judgment of the Hon'ble Supreme Court that the amount of Rs. 5,82,250/- was released in favour of the petitioner-company in the year 1997. The stand of respondent No. 3 is that it only works as an agent of the respondent-State and

as and when the amount is made available, the same is disbursed to entrepreneurs. Once the decision was taken by the respondent to award central subsidy to the petitioner amounting to Rs. 15,27,250/-, the same was to be released immediately to enable the petitioner-company to set up the Industry. The petitioner-company mid way of its project has been sanctioned a sum of Rs. 9,42,000/-. The petitioner was left in the lurch by the respondents by assuring him that he will get central subsidy of Rs. 15,27,250/- but only a sum of Rs. 9,42,000/- was disbursed to the petitioner-company. The petitioner company had no alternative but to raise the loan amounting to Rs. 7.31 lakhs as mentioned in the reply of respondent No. 3 that too at the exorbitant rate of compound interest @ 20.5%. If the petitioner had been released a sum of Rs. 5.85 lakhs, admittedly there was no need for the petitioner to raise the additional loan from the respondent No. 3. The plea of the respondent-State that the petitioner had not created assets is untenable for the simple reason that everything remaining static the petitioner had been released a sum of Rs. 5.85 lakhs which was to be released in the year 1989 instead of 1997. The petitioner was not required to raise loan from the respondent No. 3 at all. What has happened in fact is that the petitioner has not been released a sum of Rs. 5,85,250/- and the petitioner had to raise loan that too at the exorbitant rate of interest.

8. As far as the plea taken by the State that the subsidy has been 3 released after the judgment of the Hon'ble Supreme Court as mentioned in its reply is also untenable. What has been held by the Hon'ble Supreme Court in the case of Umesha Textile and another v. Union of India and another, is that the units whose application for central subsidy were received before 30.9.1988 complete in all respects, the same be considered. But in the present case there was no delay in submitting the application by the petitioner and the ratio of the judgment as relied upon by the State is not applicable to the present case. The other judgment mentioned in the reply as rendered by the Rajasthan High Court is concerned; the same is also not applicable to the present facts and circumstances of the case. In the judgment rendered by the Rajasthan High Court on 7.10.1999 in DB Civil Special Appeal (Writ) No. 677/99 the question of estoppel was not considered. The question which had fallen for consideration before the Rajasthan High Court was that whether the company was entitled, for the grant of subsidy under the scheme simply because of the fact that application had been moved by the company. The Rajasthan High Court has held that after submission of the application to get the central subsidy the same was to be considered in each case by the State Level Committee. In the present case the petitioner's application was within time and the State Level Committee had already sanctioned the central investment subsidy. The petitioner-company had also been informed by the respondent No. 3 on 25.3.1997 (Annexure P-4) that the case of the petitioner for releasing the payment of Rs. 5,85,250/- was under process and due to paucity of funds immediate disbursement was not possible. The fact that the Government had sanctioned the central subsidy amounting to Rs. 15,27,500/- to the petitioner is reflected in para 8 of Annexure P-3.

9. The petitioner has been disbursed of the release of balance amount of Rs. 5,85,250/- by the respondents in the year 1997. The petitioner was entitled to receive a sum of Rs. 5,85,250/- immediately in the year 1989. The petitioner has been made to borrow a sum of Rs. 7.31 lakhs from the respondent at the exorbitant compound rate of interest i.e 20.5%.

The plea raised by the respondents that the petitioner should have approached the Civil Court by way of filing a civil suit for the recovery of this amount is untenable in view of the law laid by the Hon''ble Supreme Court in ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, . Their Lordships have held as under:

It is clear from the above two objects of the company that apart from the fact that the company is wholly a Government owned company it discharges the functions of the Government and acts as an agent of the Government even when it gives guarantees and it has a responsibility to discharge such functions in the national interest. In this background it will be futile to contend that the actions of the first respondent impugned in the writ petition do not have a touch of public function or discharge of a public duty. Therefore, this argument of the first respondent must also fail.

The learned Counsel for the respondent then contended that though the principal prayer in the writ petition is for quashing the letters of repudiation by the first respondent, in fact the writ petition is one for a "money claim" which cannot be granted in a writ petition under Article 226 of the Constitution of India. In our opinion, this argument of the learned Counsel also cannot be accepted in its absolute terms. This Court in the case of U.P. Pollution Control Board and Others Vs. Kanoria Industrial Ltd. and Another, while dealing with the question of refund of money in a writ petition after discussing the earlier case law on this subject held : (SCC pp. 556-58, paras 12 and 16-17)

In the para extracted above, in a similar situation as arising in the present cases relating to the very question of refund, while answering the said question affirmatively, this Court pointed out that the Courts have made distinction between those cases where a claimant approached a High Court seeking relief of obtaining refund only and those where refund was sought as a consequential relief after striking down of the order of assessment, etc. In these cases also the claims made for refund in the writ petitions were consequent upon declaration of law made by this Court. Hence, the High Court committed no error in entertaining the writ petitions.

In support of the submission that a writ petition seeking mandamus for mere refund of money was not maintainable, the decision in Suganmal v. State of M.P. was cited. In AIR para 6 of the said judgment, it is stated that:

We are of the opinion that though the High Courts have power to pass any appropriate order in the exercise of the powers conferred under Article 226 of the Constitution, such a petition solely praying for the issue of a writ of mandamus

directing the State to refund the money is not ordinarily maintainable for the simple reason that a claim for such a refund can always be made in a suit against the authority which had illegally collected the money as a tax.

Again in AIR para 9, the Court held:

We, therefore, hold that normally petitions solely praying for the refund of money against the State by a writ of mandamus are not to be entertained. The aggrieved party has the right of going to the Civil Court for claiming the amount and it is open to the State to raise all possible defences to the claim, defences which cannot, in most cases, be appropriately raised and considered in the exercise of writ jurisdiction.

The judgment cannot be read as laying down the law that no writ petition at all can be entertained where claim is made for only refund of money consequent upon declaration of law that levy and collection of tax/cess as unconstitutional or without the authority of law. It is one thing to say that the High Court has no power under Article 226 of the Constitution to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, in the cases on hand where facts are not in dispute, collection of money as cess was itself without the authority of law; no case of undue enrichment was made out and the amount of cess was paid under protest; the writ petitions were filed within a reasonable time from the date of the declaration that the law under which tax/cess was collected was unconstitutional. There is no good reason to deny a relief of refund to the citizens in such cases on the principles of public interest and equity in the light of the cases cited above. However, it must not be understood that in all cases where collection of cess, levy or tax is held to be unconstitutional or invalid, the refund should necessarily follow. We wish to add that even in cases where collection of cess, levy or tax is held to be unconstitutional or invalid, refund is not an automatic consequence but may be refused on several grounds depending on facts and circumstances of a given case.

Therefore, this objection must also fail because in a given case it is open to the writ Court to give such monetary relief also.

On the basis of the above conclusion of ours, the question still remains why should we grant the reliefs sought for by the appellant in a writ petition when a suitable efficacious alternate remedy is available by way of a suit. The answer to this question in our opinion, lies squarely in the decision of this Court in the case of *Shrilekha Vidyarthi* (supra) wherein this Court held (SCC. pp. 235-37, paras 20-22 and 24):

The requirement of Article 14 should extend even in the sphere of contractual matters for regulating the conduct of the State activity. Applicability of Article 14 to all executive actions of the State being settled and for the same reason its applicability at the threshold to the making of a contract in exercise of the

executive power being beyond dispute, the State cannot thereafter cast off its personality and exercise unbridled power unfettered by the requirements of Article 14 in the sphere of contractual matters and claim to be governed therein only by private law principles applicable to private individuals whose rights flow only from the terms of the contract without anything more. The personality of the State, requiring regulation of its conduct in all spheres by requirement of Article 14, does not undergo such a radical change after the making of a contract merely because some contractual rights accrue to the other party in addition. It is not as if the requirement of Article 14 and contractual obligations are alien concepts, which cannot co-exist. The Constitution does not envisage or permit unfairness or unreasonableness in State actions in any sphere of its activity contrary to the professed ideals in the Preamble. Therefore, total exclusion of Article 14- non-arbitrariness which is basic to rule of law -from State actions in contractual field is not justified. This is more so when the modern trend is also to examine the unreasonableness of a term in such contracts where the bargaining power is unequal so that these are not negotiated contracts but standard form contracts between unequals.

Unlike the private parties the State while exercising its powers and discharging its functions, acts indubitably, as is expected of it, for public good and in public interest. The impact of every State action is also on public interest. It is really the nature of its personality as State which is significant and must characterize all its actions, in whatever field, and not the nature of function, contractual or otherwise, which is decisive of the nature of scrutiny permitted for examining the validity of its act. The requirement of Article 14 being the duty to act fairly, justly and reasonably, there is nothing which militates against the concept of requiring the State always to so act, even in contractual matters. This factor alone is sufficient to import at least the minimal requirements of public law obligations and impress with this character the contracts made by the State or its instrumentality. It is a different matter that the scope of judicial review in respect of disputes falling within the domain of contractual obligations may be more limited and in doubtful cases the parties may be relegated to adjudication of their rights by resort to remedies provided for adjudication of purely contractual disputes. However, to the extent, challenge is made on the ground of violation of Article 14 by alleging that the impugned act is arbitrary, unfair or unreasonable, the fact that the dispute also falls within the domain of contractual obligations would not relieve the State of its obligation to comply with the basic requirements of Article 14. To this extent, the obligation is of a public character invariably in every case irrespective of there being any other right or obligation in addition thereto. An additional contractual obligation cannot divest the claimant of the guarantee under Article 14 of non-arbitrariness at the hands of the State in any of its actions.

From the above, it is clear that when an instrumentality of the State acts contrary to public good and public interest, unfairly, unjustly and unreasonably, in its contractual, constitutional or statutory obligations, it really acts contrary to

the constitutional guarantee found in Article 14 of the Constitution. Thus if we apply the above principle of applicability of Article 14 to the facts of this case, then we notice that the first respondent being an instrumentality of State and a monopoly body had to be approached by the appellants by compulsion to cover its export risk. The policy of insurance covering the risk of the appellants was issued by the first respondent after seeking all required information and after receiving huge sums of money as premium exceeding Rs. 16 lacs. On facts we have found that the terms of the policy does not give room to any ambiguity as to the risk covered by the first respondent. We are also of the considered opinion that the liability of the first respondent under the policy arose when the default of the exporter occurred and thereafter when Kazakhstan Government failed to fulfill its guarantee. There is no allegation that the contracts in question were obtained either by fraud or by misrepresentation. In such factual situation, we are of the opinion, the facts of this case do not and should not inhibit the High Court or this Court from granting the relief sought for by the petitioner. Apart from the above reasons given by us to interfere with the judgment of the Appellate Bench of the High Court, we have one other good reason - why we should not drive the appellants to a suit. The claim of the appellants was rejected by the respondent in the year 1994. The respondent challenged the basis of rejection by way of a 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. We are now in the end of year 2003. We at this distance of time and stage of litigation do not think it proper to relegate the parties to a suit. To direct the appellants to approach a Civil Court at this stage would be doing injustice to the appellants. In this view of ours, we are supported by a number of decisions of this Court like in *Shambhu Prasad Agarwal and Ors. v. Bhola Ram Agarwal* 2000 9 SCC 714 wherein this Court though noticed the fact that the appellants had an alternate remedy for issuance of a letter of administration it refused to dismiss the appeal on the grounds: (SCC p.715, para 5)

Since considerable time has elapsed the interest of justice demands that the proceeding should come to an end as early as possible and that the appeal should not be dismissed merely on highly technical ground.

In *Dr Bal Krishna Agarwal Vs. State of U.P. and Others*, this Court held : (SCC p.618, para 10)

Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternate remedy u/s 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than 5 years. Since the question that is raised involves a pure question of law and even if the matter is referred to the Chancellor u/s 68 of the Act it is bound to be agitated in the Court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non-suited, the appellant on the ground

of availability of an alternative remedy. We, therefore, propose to go into the merits of the question regarding inter se seniority of the appellant and Respondents 4 and 5. We may, in this context, mention that Respondent 4 has already retired in January 1994.

10. This petition was filed on 31.5.2002 and was admitted on 2.9.2002. This Court has held in CWP No. 1100 of 2002 titled as Darshanu Ram and Ors. v. Sub Registrar and Ors. decided on 16.5.2007 that once the petition has been entertained and pending for considerable period the parties will not be relegated to avail the alternative remedy.

11. The upshot of the above discussion is that the petitioner was Nswtitled to a sum of Rs. 5,85,250/- towards the central subsidy, in the year 1989 and the action of the respondents of not releasing the same in favour of the petitioner and to make him borrow a sum of Rs. 7.31 lakhs from the respondent No. 3 with interest at the rate of 20.5% is arbitrary and unreasonable.

12. The question now arises as to what relief the petitioner is entitled to in view of the peculiar facts and circumstances of this case? The petitioner has suffered by the arbitrary action of the respondents of releasing the payment of Rs. 5,85,250/- in the year 1997 instead of 1989. Thus the petitioner is entitled to the amount paid towards the interest while raising the loan from the corporation amounting to Rs. 7.31 lakhs with effect from 29th January, 1990 till the date of release of central subsidy i.e. up to August, 1997. The respondents are directed to work out the same within a period of six weeks from the date of receipt of copy of this judgment.

13. Accordingly the writ petition is allowed in view of the above stated directions and observations. The petitioner is also entitled to costs which are quantified at Rs. 5,000/-.