(2013) 09 P&H CK 0283

In the Punjab And Haryana At Chandigarh

Case No : CWP No. 24101 of 2011

M/s. Jasoka India Ltd. APPELLANT

Vs

Punjab State Industrial Development Corporation Ltd. RESPONDENT

Date of Decision : 04-09-2013

Acts Referred:

Sick Industrial Companies (Special Provisions) Act, 1985 — Section 15(1)

Citation : (2013) 09 P&H CK 0283

Hon'ble Judges : Sanjay Kishan Kaul, C.J;Augustine George Masih, J

Bench : Division Bench

Advocate : Anand Chhibbar and Ms. Harpriya Khaneka, for the Appellant; B.S. Walia, for the Respondent

Final Decision : Disposed Off

Judgement

Augustine George Masih, J.—Petitioner, a Limited Company, has approached this Court challenging the cancellation of One time Settlement (hereinafter referred to as ''OTS'') Proposal of the petitioner and its promoters vide communication/ orders dated 09.11.2011 (Annexures P-17 and P-18). Petitioner-Company was initially carrying on the business of manufacturing shoes at Faridabad (Haryana). As an aftermath of assassination of the then Prime Minister of India on 31.03.1984, the factory of petitioner was completely burnt in the Anti Sikh Riots resulting in displacement of the promoters and their families forcing them to shift to Kurali, District Ropar, Punjab in early 1985.

2. The Managing Director of the petitioner-Company being a riot victim incorporated the Company on 03.06.1986 by availing financial assistance/cash credit facilities from the Punjab State Industrial Development Corporation and Punjab Financial Corporation (hereinafter referred to as ''PSIDC and ''PFC respectively) and also from the State Bank of India, Chandigarh. The business of the Company, which was primarily of production and export of stockings to the U.S.S.R., received a set back on disintegration of the U.S.S.R. resulting in the State Bank of India withdrawing the credit limits. There being lack of working

capital resources, the petitioner-Company was compelled to retrench its workers.

3. During this period, the account of the petitioner-Company was declared ''Non Performing Asset'' (NPA). Since the petitioner-Company had availed loan facilities by way of direct subscription of shares and term loan from the respondent-Corporation and it having gone sick with recurring losses, a reference u/s 15(1) of the Sick Industrial Companies (Special Provisions) Act, 1985 (hereinafter referred to as ''SICA Act'') was filed before the BIFR on 16.03.1999. Vide order dated 07.03.2006, the BIFR recommended the winding up of the Company. Petitioner-Company preferred an appeal before the Appellate Authority for Industrial and Financial Reconstruction (AAIFR). This appeal was dismissed.

4. The order passed by the AAIFR was challenged by the petitioner-Company in Delhi High Court, which was disposed of by the said Court on 16.02.2010, in which the counsel for the petitioner gave up the challenge to the impugned order of AAIFR and confined his relief to the consideration of the application for One Time Settlement Scheme (OTS) as floated by the respondents in accordance with their norms and for the amount deposited by it in no-lien account to be taken into consideration for the purpose of such OTS proposal. The Court was pleased to accept the said request clarifying that it is for the respondents to examine the OTS proposal in accordance with their norms and the amount deposited in the no-lien account, which was to be transferred to the Official Liquidator, be considered as a part of the amount required to be deposited by the petitioner for consideration of the OTS proposal. The respondent-Corporation was a party to the petition and was represented by a counsel.

5. It was during the pendency of the writ petition before Delhi High Court that Government of Punjab and the respondent-Corporation floated One Time Settlement Scheme for Equity and One Time Settlement for Loans 2009'' dated 02.03.2009 (Annexure P-3) to facilitate development of Industries in the State of Punjab. Thereafter, this policy was amended on 19.11.2010 (Annexure P-4). The petitioner, in response to this amended Policy, applied for benefit under the same vide letter dated 14.12.2010 and deposited an approximate 15% of the tentative OTS amount as per the calculations given by the respondents. The amount deposited was Rs. 18 lacs vide cheque dated 14.12.2010, which was duly encashed by the respondent-Corporation being 15% of the amount in direct subscription of equity as also of the term loan.

6. As per the assertion of the petitioner, the Director of the Company visited the office of the respondent-Corporation on many occasions and also made written requests to let them note the detailed calculations with regard to the amount of OTS worked out. No response was received by the petitioner-Company. As the loan of the petitioner-Company was a joint finance with the PFC, various letters were also addressed to PSIDC and PFC to claim the money lying with the Official Liquidator, New Delhi against the OTS in the light of the order passed by Delhi High Court dated 16.02.2010 referred to above.

7. A letter dated 27.09.2011 was received regarding the term loan, according to which, OTS worked out to Rs. 107.50 lacs. The petitioner-Company was called upon to deposit a sum of Rs. 27.04 lacs up to 23.10.2011 being 30% of the OTS amount along with interest after adjusting the initial deposit of Rs. 16.01 lacs. It has been asserted that 30% of Rs. 107.50 lacs comes to Rs. 32.25 lacs and the petitioner needed to deposit only a sum of Rs. 16.24 lacs as per the OTS Policy and no amount of interest had to be paid after the initial deposit of 15% of the OTS amount on 14.12.2010. As per the chart appended along with the letter, the balance amount of Rs. 86.86 lacs, which included interest, was to be paid by 18.10.2013 and in case of delay in the payment of installments, liquidated damages @ 3% per annum had to be paid on the defaulted amount.

8. As regards the buy-back of the direct subscription of the shares of the petitioner-Company, letter dated 27.09.2011 working out the OTS amount to Rs. 13.27 lacs was received, wherein the petitioner-Company was called upon to deposit a sum of Rs. 3.98 lacs up to 23.10.2011 which included interest. Petitioner asserts that 30% of the OTS amount along with interest after adjusting the initial deposit comes out to be a sum of further Rs. 1.99 lacs as per the OTS Policy as no amount of interest had to be paid after the initial deposit on 14.12.2010 of 15% of the OTS amount.

9. Petitioner-Company, on 10.10.2011, sought for the details with regard to the calculations in working out the OTS amount. In this letter, it was further requested that to realize the second installment to make good the 30% of the OTS amount, the same be realized from the amount deposited lying with the Official Liquidator, New Delhi. On 17.10.2011 under the cover letter, petitioner-Company sent cheques dated 10.10.2011 amounting to Rs. 16.24 lacs and Rs. 1.99 lacs to the respondent-Company for making good the 30% amount as per the OTS Policy. This was done as an abundant caution to avail the OTS Policy.

10. A letter dated 20.10.2011, in response to the earlier letter dated 10.10.2011, was received from the respondent-Corporation asking the petitioner-Company to deposit 30% of the OTS amount as per letter dated 23.09.2011. This the petitioner asserts is despite the fact that the petitioner-Company had sent the OTS amount as per the scheme on 17.10.2011. The cheques, which were submitted by the petitioner-Company, were not encashed by the respondent-Corporation. This was, according to the petitioner-Company, done in order to cancel the OTS sanctioned on 23.09.2011. Petitioner-Company had sufficient funds in its account on 17.11.2011 and non-encashment of the cheques by the respondents was, therefore, uncalled for. Petitioner-Company thereafter, received two letters both dated 09.11.2011 on 19.11.2011 cancelling the OTS towards the term loan as also the equity buy-back of direct subscription. The copies of these impugned letters are appended as Annexures P-17 and P-18 respectively. The reason assigned for cancellation of the OTS was the non-deposit of the second installment by the petitioner-Company and its promoters respectively. Thereafter, the officials of the petitioner-Company had been visiting the respondent-

Corporation but without any result leading to the filing of the present petition challenging the impugned letters/orders dated 09.11.2011 (Annexures P-17 and P-18).

11. Upon notice, reply has been filed by the respondents, wherein it has been stated that the writ petition deserves to be dismissed on the ground that the petitioner has approached this Court with unclean hands as the cheques dated 10.10.2011, which were tendered to the respondent-Corporation by post, were received in its office on 18.11.2011, which was beyond the period of 30 days as the last date for deposit of the 30% of the OTS amount was stipulated as 23.10.2011. Since the payment towards the OTS dues was not deposited within the stipulated period of time as per the requirement under the OTS policy, the OTS offer lapsed and, therefore, the rights, which had accrued in favour of the petitioner-Company/Promoters, stood extinguished. It has further been asserted that the cheques, which have been submitted by the petitioner-Company, are dated 10.10.2011 and were purportedly forwarded along with letter dated 17.10.2011. However, in the writ petition, it has been stated that sufficient amount was available in the account of the petitioner-Company on 17.11.2011. The petitioner-Company has failed to show that on the date of issue of the cheques i.e. 10.10.2011, it had sufficient funds in its account. On this ground also, prayer has been made for dismissal of the writ petition. Another ground taken for outright dismissal of the writ petition is that the petitioner has intentionally concealed the relevant portion of the notification dated 19.11.2010 (the amended OTS Policy) to assert that there was no requirement to deposit interest after initial 15% deposit of OTS amount by the petitioner-Company on 14.12.2010. As per Clause IV (ii), interest had to be charged @ 13.20% per annum with effect from the cut off date till the date of conveying of acceptance. Copy of the complete notification dated 19.11.2010 is appended as Annexure R/2.

12. An objection has also been taken that the present petition with regard to the direct subscription by the promoters of the petitioner-Company, who undertook to buy-back the investment made by the petitioner-Corporation by way of direct subscription in the equity of the Company, having not approached this Court challenging the cancellation of the OTS vide letter dated 09.11.2011, Annexure P-18 cannot thus be quashed.

13. On merits, it has been stated that the petitioner-Company had already been given the benefit of a sum of Rs. 43.21 lacs interest subsidy on account of it being riot affected. A sum of Rs. 90 lacs was outstanding towards principal while an amount of Rs. 4003.22 lacs was outstanding towards interest as on 31.07.2012 with further interest as per contractual rate till the date of payment. As per the OTS Policy, in case of more than one financial assistance i.e. by way of loan and or facility of direct subscription, then both financial assistances are required to be settled simultaneously. In this regard, reference has been made to Clause 4 (xiv) of the notification dated 19.11.2010.

14. The petitioner-Company submitted an offer for OTS along with deposit of Rs.

18 lacs by way of cheque dated 14.12.2010 towards 15% of the total amount towards direct subscription of equity as well as term loan. As per the tentative amount due under the OTS, the same comes out to Rs. 107.50 lacs towards term loan and Rs. 13.27 lacs towards buy-back of equity in the petitioner-Company by way of direct subscription of equity. Thus, the total amount due under OTS comes to Rs. 120.77 lacs. The offer of the petitioner-Company for OTS was accepted and the acceptance conveyed vide letters dated 23.09.2011 (Annexures P-10 and P-11 respectively) for the two OTS submitted. According to these communications, an amount of Rs. 27.04 lacs was to be deposited on account of OTS for term loan within one month from the date of issuance of the acceptance i.e. on or before 23.10.2011 while payment of Rs. 3.98 lacs was to be deposited on or before 23.09.2011 on account of OTS for buy-back equity as per Annexures P-10 and P-11. Thus in all, Rs. 30.33 lacs were to be deposited within one month of 23.09.2011 i.e. on or before 23.10.2011. Due to non-deposit of the due amount by the petitioner-Company by 23.10.2011, the respondent-Corporation was well within its rights to cancel the OTS as the OTS Policy stood violated by the petitioner and has not adhered to it.

15. The amount, which has been submitted by the petitioner i.e. Rs. 16.24 lacs and Rs. 1.99 lacs vide cheques dated 10.10.2011 drawn on Kotak Mahindra Bank, were firstly not received within the stipulated time and secondly, were short. The petitioner-Company has also failed to show that on the date of issue of the cheques, it had sufficient funds in its account to discharge the liability of the cheques, instead what has been stated is that there was sufficient balance in the account of the petitioner on 17.11.2011, which is more than one month after the issuance of the cheques dated 10.10.2011 and in any case, even on 23.10.2011, nothing has been shown by the petitioner-Company that there was sufficient funds for the encashment of the cheques issued by it. As regards the funds lying with the Official Liquidator, New Delhi, it has been stated that the respondent-Corporation could have requested the Official Liquidator to release the amount in favour of the respondent-Corporation as the amount, which was due from the petitioner as per the OTS Policy and accepted by the respondent-Corporation, was known to them and should have taken steps in this regard. The intention of the petitioner-Company is only to delay the payment due to the Corporation and has resorted to dilatory tactics. Prayer has, thus, been made for dismissal of the writ petition.

16. Counsel for the parties have made their submissions as per their pleadings and have impressed upon the Court to accept their respective stands.

17. We had reserved the judgment on 25.7.2013. While going through the pleadings on record, we observed certain gaps with regard to certain important facts, which were essential and accordingly listed the case for directions on 5.8.2003, calling upon the petitioner-Company to file an affidavit, enclosing its statement of accounts and clarifying the position of the statement of accounts from the date of issue of the cheque i.e. 10.10.2011 and 18.11.2011, the alleged

date of receipt of letter/cheque by the respondent-Corporation containing the cheque.

18. The case was posted for 19.8.2013, when the said affidavit alongwith the statement of accounts was placed on record by the petitioner-Company for the period 1.10.2011 to 31.12.2011. It has been stated in the affidavit dated 19.8.2013 that the Kotak Mahindra Bank, which handles portfolio of the petitioner-Company, has got sweeping account with the said Bank. This Bank, being the investing banker for the petitioner-Company, transfers the amount automatically from other investment accounts, so that any cheque, which is issued by the petitioner-Company, does not get dishonoured on its presentation. Further, it has been stated that the petitioner-Company had requisite funds to discharge its liability for the cheques issued in favour of the respondent-Corporation.

19. We have considered the submissions made by the counsel for the parties and have gone through the records of the case.

20. There is no dispute with regard to the liability of the petitioner-Company availing the benefit of OTS Scheme, 2009 as amended on 19.11.2010 (Annexure P-4/R-2) which proposal having been submitted by it, stood accepted by the respondent-Corporation.

21. The assertion of the petitioner-Company with regard to it being not liable to pay the interest for the period when it deposited 15% of the OTS amount i.e. 14.12.2010 till 23.09.2011, the date of issue of the acceptance letter by the respondent-Corporation and further, the rate of interest, which has to be paid by the petitioner-Company after the initial deposit of 15% of the OTS amount needs to be decided. The question would further be as to whether the impugned orders are in accordance with the facts and law as also if there can be an equitable settlement of the dispute between the parties.

22. The factum of the proposal being submitted by the petitioner-Company with regard to the term loan and buy-back of direct subscription with the initial deposit of 15% of the OTS amount on 14.12.2010 is not disputed. The proposal having been accepted by the respondent-Corporation on 23.09.2011 vide its acceptance letter has also been admitted. The question, at this stage, which needs to be answered with regard to the conflicting stands taken by the parties, i.e. the petitioner asserting no liability towards interest for the period i.e. 14.12.2010 to 23.09.2011 whereas, the respondent-Corporation asserting that interest @ 13.20% per annum with effect from the cut off date till the date of conveyance of the acceptance has to be charged i.e. whether interest is required to be paid or not? The answer to this dispute lies in Clauses III and IV of the One Time Settlement Policy 2009 as amended vide notification dated 19.11.2010 (Annexure R-2), in pursuance whereto, admittedly the petitioner-Company had submitted its proposal for the OTS. Petitioner is placing reliance on Clause III (d) of the original OTS policy dated 02.03.2009 (Annexure P-3). This stand of the

petitioner is misplaced as the amended policy dated 19.11.2010 would apply.

23. It may be added here that OTS policy was applicable to both i.e. Equity and Loans which had been dealt with separately but are verbatim the same in substance. To avoid unnecessary repetition, clauses dealing with Equity are being reproduced herein. The original relevant clauses of the policy notified on 02.03.2009 read as follows:

III. Terms of Payment

a) Receipt of Applications-Within 90 days from the date of Notification. This OTS policy is close-ended. No applications will be entertained after the last date mentioned herein.

b) Cut Off date-OTS amount will be calculated as on cut off date fully described in other terms & conditions hereinafter.

c) Rate of interest-Interest on OTS amount shall be charged @ 13.20% per annum (compounded quarterly) from the cut off date, except where mentioned otherwise.

(d) Lump-sum payment-Companies opting for lump-sum payment within 90 days of conveying of acceptance by PSIDC/PAIC, shall be eligible for rebate of 5% on the OTS amount. No interest shall be charged on the lump-sum payment provided it is made within 90 days of the date of acceptance of the proposal by PSIDC/PAIC. However, this option to be exercised at the time of application.

IV. Payment Schedule

i) Down payment of at least 15% of the tentative OTS amount along with application by way of demand draft.

ii) 30% of the OTS amount after adjusting the down payment received along with interest @ 13.20% per annum from the cut off date, within 30 days from the date of conveying of acceptance of the proposal by PSIDC/PAIC.

iii) Balance OTS amount shall also carry interest @ 13.20% per annum (compounded quarterly) and payable in eight equated quarterly installments.

This OTS policy of 2009 was amended vide notification dated 19.11.2010 (Annexure R-2). Clause III (d), as amended, reads as follows:-

(d) Lump-sum Payment Collaborators/Promoters opting for lump-sum payment any time within 90 days of conveying of acceptance by PSIDC/PAIC shall be eligible for rebate of 5% on the OTS amount. No interest shall be charged on the lump-sum payment provided it is made within 90 days of the date of acceptance of the proposal by PSIDC/PAIC. However, interest @ 13.20% p.a. shall be charged from the cut off date till the date of conveying of acceptance. Collaborators/Promoters who had opted for repayment period of two years, can make pre-payment at any stage and shall be eligible for rebate @ 2% on the remaining amount of OTS. However, the recoverable OTS amount finally calculated after rebate etc. shall not in any case be less than the outstanding principal plus expenses.

24. The amended Clause III (d), as applicable to the petitioner, clearly spells out that interest @ 13.20 per annum shall be charged from the cut off date till the date of conveying of acceptance and no interest is to be charged in case where the OTS amount is paid in lump-sum within 90 days of the acceptance of the proposal by the PSIDC/PFC. The petitioner-Company has not opted for lump-sum payment and is thus, liable to pay interest for the period 14.12.2010 to 23.09.2011.

25. As per Clause IV (reproduced above), 30% of the OTS amount after adjusting the down payment received along with interest @ 13.20% per annum from the cut off date had to be deposited within 30 days from the date of conveying the acceptance of the proposal. Petitioner was thus, required to deposit the amount on or before 23.10.2011.

26. There is a dispute with regard to the late receipt of the cheques alleged to have been sent by the petitioner-Company on 17.10.2011 through post. It has been asserted by the respondent-Corporation that the said cheques were received only on 18.11.2011, by which date the stipulated period of time for payment towards the OTS dues had expired and under the OTS Policy, no benefit could be granted to the petitioner because of failure to deposit the said amount within the time frame.

27. After arguments, judgment was reserved on 25.7.2013 and while going through the pleadings, it was observed that there were certain gaps in facts, which were essential and accordingly we had listed the case for directions on 5.8.2013. On the said date, we had called upon the petitioner-Company to file an affidavit, enclosing therewith its statements of accounts and clarifying the position from issue of cheque dated 10.10.2011 till 18.11.2011, the alleged date of receipt of letter/cheque by the respondent-Corporation. This was primarily necessary to ascertain the availability of the amount in the bank account of the petitioner-Company to discharge the liability. The case was posted for 19.8.2013.

28. In compliance thereto, an affidavit dated 19.8.2013 has been filed by the petitioner-Company, where it has been stated that Kotak Mahindra Bank, being the investing Bank for the petitioner-Company in case of any shortfall in the accounts, makes good the amount automatically from other investment accounts so that no cheque issued by the petitioner-Company goes dishonoured on its presentation. It has further been stated that on 10.10.2011, the date on which the cheque in favour of respondent-Corporation was issued, an amount of Rs. 28,08,430-38P was lying in the account. The OTS was cancelled on 9.10.2011, on which date a sum of Rs. 92,78,271-58P was lying. On 18.11.2011, the date on which respondent-Corporation claimed to have received the cheque, a sum of Rs. 24,06,700-58P was lying in the account of the petitioner-Company. On this basis, it has been asserted that the petitioner had sufficient funds in its account

to discharge the liability for encashment of the cheque issued by it to the respondent-Corporation. This assertion of the petitioner finds support from the account statement attached to the affidavit.

29. During the course of arguments, it has transpired that the petitioner-Company was and is still willing to abide by the terms and conditions of the OTS Scheme and in fact, an offer has been made by the counsel for the petitioner-Company to deposit Rs. 10 lacs alongwith the interest amount at the first instance in two weeks to show that the petitioner-Company is serious in its offer and was not intending to delay the process of realization of the dues by the respondent-Corporation.

30. On considering the offer of the petitioner-Company and keeping in view the statement of accounts, as has been produced on record and referred to above, it cannot be said that the petitioner-Company was not willing or had any intention of not sticking to the terms and conditions or the time schedule of payment, as laid down under the OTS Scheme. There appears to be some mix up, because of which the cheque, as per sub-clause (ii) of Clause 4 of the OTS Scheme either did not reach the respondent-Corporation or if it was received, the same was not processed on time. We need not go into these disputed questions of facts, especially in the light of the statement made by counsel for the petitioner in Court expressing the intention and interest in clearing all its dues.

31. Keeping in view the peculiar facts and circumstances of the present case and also taking into consideration the admitted fact that the petitioner is riot affected, by taking a lenient view and exercising our equitable jurisdiction, we are of the considered view that the ends of justice would be duly served by directing the petitioner-Company to show its bona-fides by depositing Rs. 10 lacs alongwith the interest due till the date of this judgment as per the OTS Scheme within a period of 15 days.

32. Further, as per Clause IV(ii) Payment Schedule of the OTS Scheme, the remaining amount of 30% of the OTS amount after adjusting the down payment and Rs. 10 lacs received along with interest @ 13.20% per annum will be deposited within 30 days from today. Balance Payment Schedule shall, thereafter, be followed as per Clause IV (iii) by the parties.

33. It would be the primary responsibility of the petitioner-Company to approach the Official Liquidator, New Delhi for transmission of the amount, which stands transferred to the Official Liquidator, as deposited by the petitioner-Company in the no-lien account, to the respondent-Corporation for adjustment of the said amount for utilization towards the OTS amount due from the petitioner. The respondent-Corporation shall co-operate with the petitioner-Company in all respects, wherever required in this process.

34. If the petitioner-Company complies with the directions as above, the communications/orders dated 19.11.2011, Annexures P-17 and P-18, shall continue to remain suspended till the final payment is made by the petitioner-

Company as per the schedule aforesaid and thereafter will stand quashed.

35. In case of any default on the part of the petitioner-Company, the impugned communications/letters dated 19.11.2011 (Annexures P-17 and P-18), cancelling one time settlement of the petitioner-Company in the subscription in equity and term loan account shall stand revived automatically. The respondent-Corporation shall thereafter be free to proceed against the petitioner-Company as per law. The writ petition stands disposed of accordingly.

