
(2009) 04 PAT CK 0001
In the Patna High Court
Case No : CWJC No. 6121 of 2006

M/s. Saraogi Oxygen Ltd.

APPELLANT

Vs

The State of Bihar and Others

RESPONDENT

Date of Decision : 16-04-2009

Acts Referred:

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

Citation : (2009) 3 PLJR 420

Hon'ble Judges : Navaniti Pd. Singh, J

Bench : Single Bench

Advocate : Nirmal Kumar, S.D. Sanjay and Suraj Samdarshi, for the Appellant;
K.K. Jha, for the Respondent

Final Decision : Allowed

Judgement

Navaniti Pd. Singh, J.—The petitioner by this writ application challenges the order of the Managing Director of the Bihar State Credit and Investment Corporation Limited (hereinafter referred to as BICICO) dated 13.2.2006 (Annexure-1), by which petitioner's settlement under the BICICO's One Time Settlement Scheme-2004 (OTS-2004) was cancelled and petitioner was required to pay substantial additional amount under the said scheme under general categorization. BICICO has appeared and filed a counter affidavit and two supplementary counter affidavits and rejoinder thereto has been filed, as such, with consent of parties this writ application is being heard and disposed of at this stage itself.

2. The principal question that appears to arise in this case is whether BICICO having accepted the offer of the petitioner, encashed cheques of worth Rs. 61,69,993/-and permitted the petitioner to sell hypothecated properties for making the aforesaid payment, can it now retrace and retract from its actions rejecting the said transaction altogether and forcing the petitioner to pay further substantial amount for one time settlement of dues.

3. The facts are not much in dispute. Petitioner had established a small scale industry with funds made available by BICICO. BICICO is a statutory Corporation under the State Financial Act, 1951. Petitioner had a total disbursement under two accounts of Rs. 64.32 lakhs from BICICO. The industry was for bottling industrial gases including Oxygen, which process is greatly dependent on continuous quality of power supply. Right from the beginning, when the industry was set up, it suffered greatly on account of power shortage and consequential dispute with the Bihar State Electricity Board, whereby, ultimately, electricity supply to the petitioner company was discontinued. The petitioner-Company became sick and non-operational. It was unable to pay and liquidate its liability towards BICICO. It accordingly applied to the State Government for being considered as a sick industry for the purposes of rehabilitation. Its application to the Directorate of Industry, Government of Bihar was, inter alia, accepted and registered as a sick unit, but, as is usual, for a period of one year towards consideration of schemes of rehabilitation. This process of rehabilitation, it is not in dispute, carried on and the State Level Committee/Apex Body continued its deliberation in respect of the petitioner unit without there being any effective steps taken by the State or BICICO in this regards for almost a decade. BICICO also happens to be a member of the State Level Committee/Apex Body and was fully aware that the unit was sick and rehabilitation packages were being worked out in 2004.

4. Considering the huge accumulated Non-Performing Assets (NPA) with BICICO, in fact, there being virtually no viable performing asset of BICICO, BICICO came up with One Time Settlement Scheme-2004 (OTS-2004), in order to provide an honourable exit to defaulting industrial units (almost all units under BICICO care). It formulated schemes, whereby, irrespective of the debts/balance outstanding on payment of certain proportion of the principal outstanding, depending on the categorization of industry, BICICO would close the accounts and, thus, manage to clear out its balance-sheet of the NPAs. The OTS-2004 Scheme was given wide publicity in newspapers. One of the categorization was units that were registered with BIFR/Apex Body/SLC up to 31.3.2002, depending on their period of finance by BICICO, they were to pay a proportionate sum of the principal outstanding, as reduced by payments made for getting the settlement. This created many problems unlike BIFR, when matters were considered by the Apex Body or the State Level Committee (SLC), formal registrations were seldom available. Applications were received and diarized, rehabilitation packages worked out. On the records are confirmation by those bodies (Annexures-24, 25 & 26) and the Directorate of Industry, that once a unit's application was entertained and diarized and once they were declared sick they did not have to make subsequent application or registration or keep getting their certificate renewed, so long as their cases were being considered. Strictly, speaking, even though, every one considers them sick and would be treating them, as such, including BICICO, they would be outside the purview of this category under OTS-2004, even though, BICICO itself treating them sick was

working out rehabilitation packages. The consequence would be that even if the industry was for all practical purposes the sick industry and being considered as such by such body and rehabilitation packages being worked out, merely, because, they lacked the certificate of sickness, they were to pay substantial higher price for settlement, which virtually denied the sick industries of an opportunity to make an honourable exit and settle their dues.

5. It is not in dispute that even in BICICO this problem was being considered. It is not in dispute that under the OTS Scheme itself the Managing Director of BICICO was given authority to issue clarifications or settled disputes with regard to categorizations. BICICO appointed some of its officials as in-charge for implementation of the OTS Scheme.

6. To specific averments in the writ application that when petitioner's representatives and their like tried to meet the Managing Director of BICICO in regards to the settlement scheme, they were specifically told to meet the in-charge OTS Scheme, who was competent to deal in the matter, there is no denial by BICICO.

7. On the scheme having been put in operation by communication dated 7.11.2004 (Annexure-8), petitioner received letter from BICICO informing that petitioner fall under category II(e) of the OTS Scheme meant for BIFR/Apex Body. The OTS amount was calculated at Rs. 1,02,28,000/-. Petitioner by their letter dated 15.11.2004 (Annexure-9), immediately pro-tested. Apart from others, they pointed out that the calculation was wrong, inasmuch as, under category II(e) their principal outstanding being Rs. 64,32,172/- their liability would be 150% thereof, and deducting payments made, as provided under the scheme, the liability would be Rs. 67,34,261/- and if the subsidy amount which BICICO had retained of Rs. 5,64,268/- is taken into account, then the net amount payable would be only Rs. 61,69,993/- to which they were agreeable to pay and they enclosed a post dated cheque for Rs. 2.50 lacs in anticipation of approval. Thereafter, on the very next day, as a outcome of favourable discussion at BICICO, petitioner alongwith its letter dated 16.11.2004 (Annexure-10), deposited further post dated cheque worth Rs. 59,19,993/-, which coupled with a cheque of Rs. 2.50 lacs tendered earlier totals to Rs. 61,69,993/- towards full and final settlement of the OTS amount payable. Petitioner also made it clear that if the petitioner's offer was approved then liberty be given to sell hypothecated assets of the units at the earliest to fund the post dated cheques above. A reminder to this effect was again sent by the petitioner vide their letter dated 6.12.2004 (Annexure-12), with a further request to BICICO not to encash the post dated cheque of Rs. 2.50 lakhs, as given above, till information about acceptance is given to it by BICICO. It is not in dispute that even though this letter was duly received by BICICO on the very next day i.e. 7.12.2004 BICICO encashed the cheque of Rs. 2.50 lacs and issued receipt thereof, to the petitioner (Annexure-13). On that very day BICICO wrote another letter to the petitioner dated 7.12.2004 (Annexure-14), in which, it was pointed out that their earlier

letter dated 7.11.2004 (Annexure-8), by which the settlement amount was quantified at Rs. 1,02,28,000/- stood amended and now, as petitioner had requested for being treated under II(e) category, the settlement amount was Rs. 84,63,000/-. At this stage, I may point out that this letter was obviously wrong and misleading on two counts. Firstly, as would be seen with reference to letter dated 7.11.2004 of BICICO (Annexure-8), it was not the offer of petitioner that it would fall under category II(e), rather that came from BICICO itself and secondly petitioner had given calculation in respect of their liability under category II(e) by their letter dated 15.11.2004 (Annexure-9), which was not pointed out to be wrong still the OTS amount was calculated without giving details at Rs. 84,63,000/-. Petitioner immediately protested by their letter dated 17.12.2004 (Annexure-15) and reiterated that they had made full payments of Rs. 61,69,993/- and again demanded approval of permission to sell the hypothecated assets to enable it to fund the honouring of post dated cheques as per their offer.

8. This was responded to by BICICO by their letter dated 21.12.2004 (Annexure-16), whereby, referring to petitioner's letter dated 6.12.2004 (Annexure-12) and letter dated 17.12.2004 (Annexure-15), BICICO accepted the request and granted conditional permission to sell the assets. The conditions were that the sale would be made in presence of authorized representatives of BICICO and the sale proceeds would be used exclusively for replacement of post dated cheque by demand drafts of equal amounts and any diversion of sale proceeds would amount to criminal breach of trust and defalcation of fund of BICICO. It further stipulated that deviation from the above condition shall amount to withdrawal of OTS facility. It is not in dispute and is evident from the proceedings recorded, as contained in Annexure-17, that the hypothecated assets were sold in presence of representative of BICICO and sale proceeds, deposited to enable full payment of the OTS amount as offered by the petitioner.

9. It now appears that the matter with regard to registration of units as sick industries was considered by BICICO. There were discussions between the incharge OTS and the Managing Director. Managing Director of BICICO agreed to amend the OTS policy and clarified that mere registration/application to such bodies would be sufficient compliance and consent of those bodies (in the shape of certification) shall not be needed. This was decided by the Managing Director on 11.4.2005 and accordingly BICICO published the amended OTS policy, in which, it was clearly provided that details of application to BIFR/Apex Body (SLC) should be furnished by units trying to avail of OTS under the said categorization. This amended scheme as circulated by BICICO itself is contained in Annexure-B, to BICICO's first supplementary counter affidavit.

10. Curiously, the petitioner is now by letter dated 5.7.2005 (Annexure- 18), to the writ application and Annexure-A series to the first counter affidavit of BICICO, is informed that it was liable to pay Rs. 85,49,000/- for OTS, as against which it had paid only about Rs. 59.19 lakhs. It should immediately pay the

difference or the benefit could be withdrawn. This was reiterated by BICICO's letter dated 28.12.2005, to which petitioner protested, which resulted in the impugned Annexure-21 dated 13.2.2006, recalling the settlement and directing the petitioner to pay under general category Rs. 1,02,28,000/-, as per the first letter of BICICO dated 7.11.2004. While doing so, the Managing Director held that the action of its in-charge OTS was unauthorized. The in-charge OTS had misled the then Managing Director into getting the OTS Scheme modified. The incharge OTS had no authority to permit sale of hypothecated assets.

11. In fairness to learned counsel for the BICICO, I must refer to a subsequent letter written by BICICO dated 30.6.2006, which is Annexure-B, to the first counter affidavit. By that letter, which was after the writ application had been filed BICICO informed the petitioner that the Board of Directors of BICICO in their meeting dated 7.2.2006 had disapproved the Managing Director's decision to permit mere applications to the Apex Body to be a sufficient compliance for a sick unit and, as such, petitioner having not furnished the certificate of sickness was liable to be treated under general category and make payment accordingly incurring further liability of almost about Rs. 40,00,000/-, having already paid over Rs. 61 lacs which was duly appropriated by BICICO long back.

12. First, coming to this change of stand by BICICO with regard to sick industries. The reason for this change emanates from the change of the Managing Director of the said Corporation. Nowhere in the counter affidavit of BICICO is it stated that the Managing Director, who approved the change ever took stand that he was misled. The proceedings of BICICO itself dated 11.4.2005, clearly show that the Managing Director had taken a conscious decision. So long as he was there, the modified BICICO OTS policy was acted upon. Soon after he left, apparently certain financial constraints forced BICICO to retract its earlier stand. The reason is not far to search. The reason is to be found in agenda to the Board on which the Board took a decision on 7.2.2006 and is part of Annexure-B series, to the first counter affidavit of the Corporation, where, it was pointed out by the Corporation that if certain units, who had been treated as sick units (BIFR/Apex Body) were treated to be under general category, the Board would get, under the settlement, an additional amount of Rs. 370.90 lacs. It is apparent that it is this realization of loss of Rs. 370.90 lacs that made the Board of BICICO change the stand taken by the then Managing Director earlier. So long as, the previous Managing Director was there no one took this stand, but the moment there was change of guards, on simply financial considerations without considering the object of sickness and an honourable exit to sick units, such a decision was taken. This apparently clearly shows and establishes arbitrariness on part of BICICO the unfortunate fall out of which was, while no action was taken against the then Managing Director, who was allegedly "misled", the in-charge of BICICO was dismissed from service. It would be seen from an earlier judgment of this Court in the case of Zakir Hussain Vs. Bihar State Credit and Investment Corporation Ltd. and Others, , that this ploy of the Managing Director being misled is not a new plea but is conveniently taken. In

the case of S.J.S. Business Enterprises (P) Ltd. Vs. State of Bihar and Others, , which case questioned the action of the respondent-BICICO on grounds of abuse of process and acting unreasonably in matters of exercise of powers u/s 29 of the State Financial Corporation Act, the Apex Court set aside the actions of the BICICO and while doing so their Lordships in paragraph 17 of the reports held thus:--

"...It is axiomatic that the statutory powers vested in State Financial Corporation under the State Financial Corporations Act, must be exercised bona fide. The presumption that public officials will discharge their duties honestly and in accordance with law may be rebutted by establishing circumstances which reasonably probalilise the abuse of that power. In such event it for the officer concerned to explain the circumstances which are set up against him. If there is no credible explanation forthcoming the Court can assume that the impugned action was improper...that in the matter of sale u/s 29, State Financial Corporations must act in accordance with the statute and must not act unfairly i.e. unreasonably. If they do, their action can be called into question under Article 226. Reasonableness is to be tested against the dominant consideration to secure the best price for the property to be sold...."

13. Again in the case of Gajraj Jain Vs. State of Bihar and Others, , wherein again the conduct of respondent-BICICO directly was, in question, on grounds of mala fide and acting in breach of Section 29 of the State Financial Act, the Apex Court held it so referring to paragraph 17 of the judgment of the Apex Court in the case of S.J.S. Business Enterprises (P) Ltd. (supra). It clearly held that while dealing with properties mortgaged on the facts found, the conclusion was that Corporation had misused its authority and power in breach of law by taking into account extraneous matter and by ignoring relevant matters which had rendered of its actions ultra vires. Then again coming nearer to home I may refer to the judgment of Zakir Hussain Vs. Bihar State Credit and Investment Corporation Ltd. and Others, , here again BICICO was exercising its rights u/s 29 of the State Financial Act. This Court took pains to note the long sequence of events of 7 auctions of the same property by BICICO, where writ petitioner therein was virtually the only contender, each time on assurances in course of negotiations the writ petitioner was made to deposit substantial sums of money and on some pretext or the other the Board of Directors of BICICO would then cancel the settlement so arrived. The Court found that not only the action of the Corporation was mala fide in law it also held that the decisions of the Board of Directors of the Corporation also lacked in bona fide and were set aside. It is interesting to note that there also a similar plea was taken by BICICO that its Managing Director was misled into taking a wrong decision. This Court held in paragraph 43 of the said report, as under noted:--

"...This Court finds it difficult to appreciate the action of the Corporation in renegading from the offer made by it to the petitioner on 2.5.2005 approved by the Managing Director by simply stating that the Managing Director was misled

into taking a wrong decision. It is not the case of the Corporation that any action has been taken against the official who misled the Managing Director into taking such wrong decision. This Court is satisfied that the resolution of the Board of Directors of respondent-Corporation dated 19.10.2005 at Annexure-F to settle the property on lease with intervenor respondents 4 to 6, is in teeth of the interim order of this Court dated 9.2.2005. The resolution of the Board of Directors dated 19.10.2005 therefore does not stand the scrutiny of this Court as being proper, bona fide and in accordance with law, protecting the best interest of the Corporation the same is accordingly set aside...."

14. Now, we must consider the fate of petitioner. As would be seen from the facts stated above, petitioner made an unequivocal offer and gave post dated cheques in support thereof, for full and final settlement of its dues under the OTS scheme. BICICO itself had categorized petitioner as a Class II(e) unit. It specifically requested BICICO not to encash the cheques till its offer was accepted. It requested for permission to sell hypothecated goods to honour the post dated cheques. BICICO appropriated the cheque, granted permission to sell the hypothecated goods and appropriated the sale proceeds towards the OTS liability, as offered by petitioner. This, in my view, concluded the matter. Officers of BICICO were acting within their apparent authority. Petitioner was never told that they had no authority for their actions. BICICO is, thus, estopped from resiling from its stand. Once BICICO appropriated the payments, it could not give up the conditions associated with the payments for it is well established that one cannot approbate and reprobate at the same time. Estoppels by conduct apply. Principles of approbate and reprobate come into play and reference may be made to Apex Court decision in the case of Nagubai Ammal & Others vs. Shama Rao & Others, AIR 1956 Supreme Court 593 (supra), as noted hereunder:--

"A person cannot say at one time that a transaction is valid and thereby obtain some advantage, to which he could only be entitled on the footing that it is valid, and then turn round and say it is void for the purpose of securing some other advantage. That is to approbate and reprobate the transaction."

15. This doctrine is a part of doctrine of election namely that no party can accept and reject the same transaction. If it has accepted a part of the transaction to its advantage, it must accept the other part also however disadvantageous it may be but having elected to accept a part, it cannot reject the other part. Therefore, I hold that in the facts, BICICO cannot resile and demand further payments for issuance of no dues certificate.

16. Thus, in my view, BICICO cannot be permitted to demand anything further from the petitioner on account of balance due under OTS-2004. The demand, as contained in Annexure-21 and Annexure-B, their letter dated 30.6.2006 cannot be sustained. BICICO must now issue no dues certificate to the petitioner treating the petitioner's account closed on full settlement. With the aforesaid observations and directions, the writ application is allowed.