

(2014) 02 DEL CK 0218

In the Delhi High Court

Case No : LPA 808 of 2012 and CM No. 20667 of 2012 (for stay)

National Textile Corporation Ltd.

APPELLANT

Vs

Union of India and Another

RESPONDENT

Date of Decision : 10-02-2014

Acts Referred:

Constitution of India, 1950 — Article 226

Textile Undertakings (Nationalisation) Act, 1995 — Section 17 2(1) 2(a) 2(g) 2(m)

Citation : (2014) 02 DEL CK 0218

Hon'ble Judges : Nuthalapati Venkata Ramana, C.J;Rajiv Sahai Endlaw, J

Bench : Division Bench

Advocate : Sandeep Sethi, Mr. Sanjoy Ghose and Mohd. Farukh, for the Appellant; Ruchir Mishra, for R-1 and Mr. Kamal Khurana, for R-2, for the Respondent

Final Decision : Allowed

Judgement

Rajiv Sahai Endlaw, J.—This intra-court appeal impugns the judgment dated 22nd November, 2012 of the learned Single Judge of this Court of dismissal of W.P. (C) No. 5527/2012 filed by the appellant. The said writ petition was filed impugning the notice dated 17th October, 2011 of arbitration served on the appellant and for restraining the respondents in the writ petition i.e. Union of India (UOI), Ministry of Heavy Industries & Public Enterprises and the UCO Bank from proceeding further with the "illegal and unconstitutional arbitral proceedings". Though the pleadings in the writ petition as well as memorandum of appeal are quite vague and ambiguous, but the position which emerges is:

(i) that with effect from 1st April, 1994, by virtue of Section 3(1) of the Textile Undertakings (Nationalisation) Act, 1995 the right, title and interest of Shree Sitaram Mills Limited (hereinafter called the "earlier owner Company") in relation to its textile undertaking by the name of Shree Sitaram Mills, N.M. Joshi Marg, Bombay (hereinafter called the Textile Undertaking) stood transferred and vested absolutely in the Central Government and by virtue of Section 3(2) of the said

Act, the said Textile Undertaking which had so vested in the Central Government, stood transferred to and vested in the appellant;

(ii) that the earlier owner Company had availed of financial accommodation from the respondent UCO Bank;

(iii) that the respondent UCO Bank on 21st November, 1996 instituted proceedings before the High Court at Mumbai for recovery of its dues from the earlier owner Company and which proceedings were subsequently transferred to the Debt Recovery Tribunal (DRT);

(iv) that as per Section 8 read with First Schedule of the Act aforesaid, the earlier owner Company was entitled to an amount of Rs. 1,95,20,000/- from the Central Government for transfer to and vesting in the Central Government of its right, title and interest in the said Textile Undertaking;

(v) that Section 17 of the said Act provided for the appointment of a Commissioner of Payment for disbursement of the aforesaid amount to the earlier owner Company;

(vi) that as per Section 5(1) of the said Act, every liability, other than the liability specified in sub-section (2) of the owner of a textile undertaking, in relation to the textile undertaking in respect of any period prior to 1st April, 1994, was to be of the earlier owner only and enforceable against the earlier owner only and not against the Central Government or the appellant. Sub-section (2) specified liabilities arising out of the loans advanced by the Central or the State Government; suffice it is to state that the loans advanced by the Banks including the Nationalised Banks do not find mention in subsection (2); Section 5(3)(b) further provides that no award, decree or order of any Court in relation to any textile undertaking, passed after 1st April, 1994 in respect of any matter, claim or dispute which arose before 1st April, 1994, shall be enforceable against the Central Government or the appellant;

(vii) that Section 20 of the said Act provides that every person having a claim against the earlier owner of a textile undertaking shall prefer such claim before the Commissioner of Payments;

(viii) the respondent UCO Bank also preferred a claim of its dues from the earlier owner Company before the Commissioner of Payments;

(ix) that the Commissioner of Payments allowed part of the claim of the respondent UCO Bank and rejected the remaining claim;

(x) that the respondent UCO Bank received a total sum of Rs. 1,59,82,634/- from the Commissioner of Payments out of the monies deposited by the Central Government with the Commissioner of Payments towards compensation for acquisition of the Textile Undertaking of earlier owner Company;

(xi) that the respondent UCO Bank, claiming that it was entitled to the balance amount also from the Central Government, impleaded the UOI also as a party

before the DRT;

(xi) that the DRT, in the light of the judgments of the Supreme Court in *Oil and Natural Gas Commission Vs. Collector of Central Excise*, *Oil and Natural Gas Commission and Another Vs. Collector of Central Excise*, and *Oil and Natural Gas Corporation Ltd. Vs. City and Indust. Dev. Corpn., Maharashtra and Others*, and being of the view that the dispute was between the nationalised UCO Bank on the one hand and UOI on the other hand, referred them to the Permanent Machinery of Arbitration (PMA) for settlement of commercial disputes between public sector enterprises inter se and public sector enterprises and government departments;

(xii) the Joint Secretary in the Department of Heavy Industries and Public Enterprises appointed as Arbitrator under the PMA, in order dated 17th October, 2011 in the said arbitration proceedings, showed the respondent UCO Bank as claimant and the earlier owner Company and the appellant as respondents and directed the respondent UCO Bank to file its statement of claim and issued notice of arbitration to the earlier owner Company and the appellant; the said order also recorded that as per the Scheme of PMA, a speaking award shall be published and any party aggrieved therefrom may file an appeal before the Law Secretary, Department of Legal Affairs, Ministry of Law and Justice for setting aside or revision of the award and that there shall be no further appeal against the decision of the Law Secretary and neither party shall be allowed to go to the Court for setting aside of the arbitration award and the provisions of the Arbitration and Conciliation Act, 1996 are not applicable and the award shall be binding upon the parties;

(xiii) that the respondent UCO Bank filed a claim petition dated 17th November, 2011 before the PMA, showing the UOI (instead of the appellant) and the earlier owner Company as respondents thereto, for recovery of the balance amount of Rs. 1,03,76,04,149.47 paise claimed to be due to it, jointly and severally from the UOI and the earlier owner Company;

(xiv). the appellant, on receiving the notice/order dated 17th October, 2011 supra, filed an application before the Arbitrator aforesaid contending that the arbitration proceedings against it were not maintainable and seeking withdrawal of the order/notice dated 17th October, 2011 and discontinuance of the arbitral proceedings pleading, a) that the appellant was under the control of an independent Board of Directors and was not a Government department; b) that the arbitral proceedings were not based on any statute or consent; c) that the PMA was constituted on the basis of the mandate of the Supreme Court in the judgments aforesaid but which mandate had been withdrawn in subsequent judgment in *Electronics Corporation of India Ltd. Vs. Union of India (UOI) and Others*, of a date before the order/notice dated 17th October, 2011; d) that the arbitral proceedings were thus without jurisdiction and legal sanctity; e) that there was no arbitration agreement between the respondent UCO Bank and the appellant and which was a prerequisite for arbitration even before the PMA; f)

that the said arbitration proceedings deprived the appellant from access to the ordinary Courts of the land; g) that the claim of UCO Bank related to pre-takeover dues and which as per the Act aforesaid was not the liability of the appellant; h) that the UCO Bank had already approached and obtained the amount due to it for the post-takeover period from the Commissioner of Payments under the said Act; and, i) that the appellant was a sick industrial company within the meaning of The Sick Industrial Companies (Special Provisions) Act, 1985;

(xv) the respondent UCO Bank filed a reply to the aforesaid application contending the proceedings to be maintainable before the PMA; and,

(xvi) the Arbitral Tribunal under the PMA, vide order dated 28th June, 2012, held that the practice of the PMA was to decide all the issues at one time and thus directed the parties before it to file their evidence and which led the appellant to file the writ petition from which this appeal arises.

2. No reply was filed by the respondent UCO bank to the writ petition.

3. The learned Single Judge, vide the impugned judgment, dismissed the writ petition, finding/observing/holding:

(a) that the Arbitral Tribunal vide its notice dated 17th October, 2011 had made the appellant a party to the arbitral proceedings;

(b) that since the appellant had taken over "Sita Ram Mills Ltd.", it is liable to pay the outstanding dues of the respondent UCO Bank and the contention that the appellant is not concerned with the debts owed by "Sita Ram Mills Ltd." under the provisions of the Act aforesaid, is erroneous;

(c) that the appellant having taken over the "Sita Ram Mills Ltd.", is liable for payment of outstanding dues of UCO Bank;

(d) that the application of the appellant before the Arbitral Tribunal was premised on the judgment in Electronics Corporation of India Ltd. supra which had done away with the mechanism of the "Committee on Disputes";

(e) however the doing away of the mechanism of Committee on Disputes did not amount to doing away with the PMA;

(f) that the appellant being a Central Public Sector Enterprise, its consent was not necessary for initiation of arbitration proceedings under the PMA scheme;

(g) that the question whether the appellant was liable for the debts of "Sita Ram Mills Ltd." or not was a mixed question of fact and law and could not be determined without looking into various factual and legal aspects including interpretation of the Act aforesaid;

(h) that though the PMA mechanism excluded the applicability of the Arbitration & Conciliation Act, 1996 but the principles thereof would apply and the Arbitral Tribunal under the PMA was thus entitled to ascertain both, the existence and

validity of the arbitration agreement; reliance in this regard was placed on National Insurance Co. Ltd. Vs. Boghara Polyfab Pvt. Ltd., and S.B.P. and Co. Vs. Patel Engineering Ltd. and Another,

(i) that the contention of the appellant that it was not a party to the proceedings was dependant on whether or not the appellant is the owner of "Sita Ram Mills Ltd.";

(j) that the Arbitral Tribunal could not be expected to, in a summary manner determine whether or not the appellant was liable for the dues of "Sita Ram Mills Ltd." without appreciating the full contours of the claim of UCO Bank;

(k) that the appellant was not contesting the claim of UCO Bank on merits but only on the ground that it was not liable for the said dues;

(l) that any interference by the Court at that stage would result in delay in adjudication of disputes under the PMA mechanism;

(m) that the Arbitrator was correct in holding that to avoid delay, all matters need to be decided together;

(n) that the question of jurisdiction raised by the appellant before the Arbitrator was dependent on facts on which evidence was yet to be led.

4. Notice of this appeal was issued and vide order dated 12th December, 2012, interim stay of arbitral proceedings in so far as against the appellant, was granted. The respondent UCO Bank has filed a counter affidavit, to which a rejoinder has been filed. No counter affidavit has been filed by the respondent Union of India.

5. The senior counsel for the appellant before us has not challenged the finding of the learned Single Judge of the PMA scheme continuing to exist notwithstanding the judgment in Electronics Corporation of India Ltd. supra. His only contention is, (a) that the learned Single Judge has erred in presuming that the appellant has taken over "Sita Ram Mills Ltd." which is a company under the Companies Act, 1956; and, (b) that the appellant under the provision of the Act, is not liable for the dues of UCO Bank and which aspect does not require any factual consideration.

6. The counsel for the UCO Bank has not made any argument on the said aspect.

7. The counsel for the Union of India has argued that only the Committee on Disputes constituted earlier under the ONGC judgment has been abolished vide the subsequent judgment in Electronics Corporation of India Ltd. supra and the PMA scheme is different from the Committee on Disputes and continues to be in force.

8. We have considered the contention, examined the records and the provisions of the Act and proceed to adjudicate, on the premise that "Shree Sita Ram Mills Ltd." as referred to in the First Schedule to the Act and "Sita Ram Mills Ltd." as

referred to in the impugned judgment, are one and the same. Suffice it is to observe that neither counsel has addressed on this aspect.

9. The Act aforesaid was enacted to provide for the acquisition and transfer of the "textile undertakings" and the right, title and interest of the owners in respect of textile undertakings specified in the First Schedule thereto and of which, prior thereto, management had already been taken over by the Central Government u/s 3 of the Textile Undertakings (Taking Over of Management) Act, 1983.

10. Section 2(g) of the said Act defined "owner" in relation to a textile undertaking as any person or firm who/which, immediately before the appointed day (defined in Section 2(a) as 1st April, 1994) was the proprietor or lessee or occupier of the textile undertaking. Section 2(1) defined a "textile company" as a company, within the meaning of the Companies Act, 1956, specified in column (3) of the First Schedule as owning the textile undertaking specified in the corresponding entry in column (2) of the said Schedule. Section 2(m) defined the "textile undertaking" as the undertaking specified in column (2) of the First Schedule, the management of which, before the appointed day, was taken over by the Central Government. The First Schedule to the Act, at serial number 12 thereof, under column (2) titled "Name of Textile Undertaking" mentioned "Shree Sitaram Mills" and under column (3) titled "Name of Owner" mentioned "Shree Sitaram Mills Ltd."

11. u/s 3(1) of the Act, as aforesaid, the right, title and interest of the owner in relation to the textile undertaking stood transferred to and vested absolutely in the Central Government and u/s 3(2), immediately after such vesting transferred to the appellant. As per Section 4, the textile undertaking, which so stood vested in the Central Government and thereafter transferred to the appellant, included all assets, rights, privileges, movable and immovable properties, investments, book debts, which were earlier in the ownership of the Textile Company, and freed and discharged of all mortgages etc. in the appellant.

12. Section 5 of the Act provided that the vesting of the textile undertaking in the Central Government and transfer thereof to the appellant was not to make the appellant responsible for the liabilities of the earlier owner of the said textile undertaking in respect of any period prior to 1st April, 1994 and the said liabilities were to be met out of the compensation aforesaid payable by the Central government for acquisition of the textile undertaking, by making a claim therefor before the Commissioner of Payments as mentioned hereinabove.

13. We have as such enquired from the senior counsel for the appellant, what is there to show that the claim of the respondent UCO Bank before the PMA is with respect to liability prior to 1st April, 1994.

14. The senior counsel for the appellant invited attention to the claim petition filed by UCO Bank before the PMA and in which "Sita Ram Mills Ltd." is referred to as the respondent No. 2, and which is as under:

2. The Respondent no. 2 was nationalized with effect from 1st April 1994 under the Textile Undertaking (Nationalisation) Act, 1995 (hereinafter called, "the said Act") and prior to takeover of the Management of the Respondent No. 2 under the said Act, a sum of money to the extent of Rs. 11,70,39,000/- became due and payable by the Respondent No. 2 to the claimant.

The senior counsel for the appellant contends that the UCO Bank in the claim petition aforesaid has clearly admitted that dues claimed by it are of the period "prior to takeover". He thus argued that as per the provisions of the Act, the liability therefor is not of the appellant and remains of the earlier owner company and the same does not require any evidence to be recorded or adjudication and the arbitration proceedings against it are therefore misconceived and the appellant had no other remedy but to prefer the writ petition from which the appeal arises.

15. Not finding the claim petition to be setting out any detail of dues etc. or the nature of financial facilities/accommodation that were granted by the respondent UCO Bank, we enquired from the counsel for the respondent UCO Bank whether we can proceed on the premise that the claims of the UCO Bank in the arbitration proceedings relate to the period prior to 1st April, 1994.

16. The counsel for the respondent UCO Bank states that he has no other records/material available with him and as per para No. 2 aforesaid of the claim petition, the dues are of the period prior to take over of "Sitaram Mills" by the Central Government under the Act aforesaid and vesting thereof in the appellant.

17. Once it is not in dispute that the claims of the respondent UCO Bank lodged before the PMA against the earlier owner Company and Union of India, are of the period prior to the appointed day, as per the Act, the liability therefor is not of the appellant. The counsel for the respondent UCO Bank has not addressed any argument on this aspect also.

18. As per the claim petition of the respondent UCO Bank before the PMA, the amount claimed by it was due to it before the take over/acquisition of the textile undertaking of the earlier owner Company vide the Act aforesaid. As per the scheme of the said Act, the said dues, even though pertaining to the textile undertaking so acquired by the Central Government and transferred to the appellant, did not become the liability of the Central Government or the appellant. The same remained the liability of the earlier owner Company, which, significantly, was neither taken over under the Act aforesaid nor had ceased to exist. Only its textile undertaking was taken over. In our opinion, the learned Single Judge fell in error in not appreciating the difference between the "textile undertaking" and the "textile company" and in the impugned judgment presuming that "Sitaram Mills Ltd." was taken over when only "Sitaram Mills" i.e., the textile undertaking of "Sitaram Mills Ltd." was taken over.

19. The High Court of Madras in *Swadeshi Cotton Mills Co. Ltd. and Another Vs. Commissioner, Central Provident Fund and Others*, and the High Court of

Allahabad in U.P. State Sugar Corporation Ltd. Vs. Dr. Kailash Behari Sharma and Another, , though in relation to provisions of The Swadeshi Cotton Mills Company Ltd. (Acquisition & Transfer of Undertakings) Act, 1986 and the Uttar Pradesh Sugar Undertaking Acquisition Act, 1971 respectively but provisions of which are found *pari materia* to the provisions of the Act with which we are concerned, also held that the liability remains of the earlier owner Company and does not become of the appellant or U.P. State Sugar Corporation Ltd.

20. The counsel for the respondent UCO Bank has not been able to satisfy/demonstrate to us, as to how the responsibility for the dues claimed, if of the period prior to take over, can be transferred on the appellant.

21. There is another aspect. The respondent UCO bank made the claim for the entire amount before the Commissioner of Payments, before whom, as per Section 20 of the Act, only the claims against the earlier owner Company were to be made, thereby admitting the liability therefor to be of the earlier owner Company only. Even if the respondent UCO Bank had any grievance against the decision of the Commissioner of Payments, the same did not entitle the respondent UCO Bank to make the claim against the appellant. The respondent UCO Bank in fact made the claim in the claim petition aforesaid, jointly and severally against the earlier owner Company and the Union of India (probably because of its grievance against the decision of the Commissioner of Payments). However the learned Arbitrator treated the claim of the respondent UCO Bank as against the earlier owner Company and the appellant (probably treating the Union of India and the appellant as one but which is not so). It is perhaps for this reason that the respondent UCO Bank is unable to here also show the basis on which the appellant can be said to be liable.

22. We may notice that it is also the contention of the senior counsel for the appellant that the claim against the earlier owner Company, before the PMA is not maintainable. However, the appellant has no locus to take the said plea, particularly when we have on the basis of the provisions of the Act and admission of the respondent UCO Bank found the appellant to be not liable.

23. Though the Supreme Court as well as this Court have, in the context of the provisions of the Arbitration and Conciliation Act, held writ petitions to be not available but the learned Single Judge has held the arbitration before the PMA to be not governed by the Arbitration and Conciliation Act. That finding is not challenged before us. The only alternative remedy of the appellant in such circumstances could be of a suit. However in the face of the admitted facts and the statutory provisions, it is not deemed appropriate to refuse to exercise the jurisdiction under Article 226 and to relegate the appellant to a civil suit. No objection to maintainability of writ petition appears to have been taken before the learned Single Judge also. We therefore find merit in the contention that on the plea of the respondent UCO Bank of the dues claimed by it being of the period prior to the take over by the Central Government of the textile undertaking earlier owned by Shree Sitaram Mills Ltd., the appellant cannot be

said to be liable therefor and the arbitration proceedings before PMA for recovery thereof, against the appellant are misconceived. Resultantly, the appeal is allowed and the judgment of the learned Single Judge is set aside and the writ petition filed by the appellant allowed by quashing the notice/order dated 17th October, 2011 of the Arbitral Tribunal under the PMA in so far as against the appellant and by restraining the said Arbitral Tribunal from proceeding against the appellant.

However no costs.