

(2010) 10 CAL CK 0004

In the Calcutta High Court

Case No : G.A. No. 6 of 2010, A.P.O.T. No. 6 of 2010, A.P.O. No. of 2010 and
W.P. No. 411 of 2007

Punjab and Sind Bank

APPELLANT

Vs

Snow View Properties Ltd.

RESPONDENT

Date of Decision : 05-10-2010

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 226

Recovery of Debts Due to Banks and Financial Institutions Act, 1993 — Section 19, 4

Citation : AIR 2010 Cal 94 : (2010) 1 CALLT 447 : (2011) 1 CHN 331

Hon'ble Judges : Pinaki Chandra Ghose, J; Harish Tandon, J

Bench : Division Bench

Advocate : Kalyan Kr. Mitra, Sourav Kr. Mukherjee and Ramesh Ch. Prusti, for the Appellant; Soumen Sen, Aniruddha Roy, O.P. Jhanghanda and S. Chowdhary, for the Respondent

Judgement

Pinaki Chandra Ghose, J.—This appeal is directed against a judgment and/or order dated 1st December, 2009 passed by the Hon'ble First Court allowing the Writ Petition No. 411 of 2007 and thereby directing the Appellant bank to return the securities to the Respondent No. 1.

2. The writ Petitioners/Respondents filed the writ petition inter alia praying for the following order:

(a) A writ in the nature of Mandamus do issue commanding the Respondent bank to withdraw and/or cancel and/or rescind and/or revoke the three several letters dated April 11, 2006, June 16, 2006 and August 30, 2006 being Annexure-hereto;

(b) A writ in the nature of Mandamus do issue commanding the said Respondent bank and each of them to act in accordance with law and to release the securities/security documents namely the said Lease Deed in Original for the said premise, the Deeds of Personal and Corporate Guarantees and the Deed of Hypothecation of raw materials, stocks and goods;

(c) A writ in the nature of Certiorari do issue commanding the said Respondent bank and each of them to certify and transmit all records relating to such satisfaction of claim and upon satisfaction of claim and upon consideration of all such records to pass appropriate orders including a direction to release such securities/security documents so as to do conscionable justice;

(d) Rule NISI in terms of prayers above and in the event no cause or insufficient cause is shown, the Rule be made absolute;

(e) Injunction restraining the Respondent bank from enforcing any of the securities/security documents namely the said Lease Deed in Original for the said premise, the Deeds of Personal and Corporate guarantees and the Deed of Hypothecation of raw materials, stocks and goods in manner whatsoever;

(f) Direction upon the Respondent bank to release and handover the securities and securities documents namely the said premise, the Deeds of Personal and Corporate Guarantees and the Deed of Hypothecation of raw materials, stocks and goods;

(g) Ad interim order in terms of the prayer (e) and (f);

(h) Costs of and/or incidental to this application be borne by the Respondent bank;

(i) Such further or other order or orders and/or direction or directions be given as this Hon''ble Court may deem fit and proper.

3. It appears that His Lordship after hearing the parties was pleased to allow the prayers (a) and (b) of the petition.

4. The facts of the case briefly are as follows:

5. The writ Petitioner No. 1 is a company duly incorporated under the Companies Act, 1956 (hereinafter referred to as the said Act of 1956) and having its registered office at 135A, Biplabi Rash Behari Bose Road, Kolkata-700 001. The main objects of the Respondent company are that the development of the immovable properties. The Respondent company acquired a premise at 42/C, Ballygunge Circular Road, Kolkata - 700 019 (hereinafter referred to as the "said premise") by and/or under a registered lease (hereinafter referred to as the "said lease deed") from one namely Bengal Bihar Construction Company Limited (now in Liquidation). The said lease is for a period of 99 years with an option for renewal for another period of 99 years. The said lease is still subsisting.

6. The Petitioner company was the constituent of the Respondent bank since 1996. A credit facility had been sanctioned namely "Inland Letter of Credit" with a limit of Rs. 85,00,000/-. The Respondent company created equitable mortgage of its leasehold interests in respect of the said premise by depositing the lease deed in original with the Appellant bank. Apart from the above mortgage the Appellant bank had also obtained the hypothecation of the raw materials, goods and stocks under a Deed of Hypothecation dated 28th February, 1997 executed

by the Petitioner company and further the personal guarantees of two individuals namely one Sri Jagdish Prasad Poddar and Sri Sushil Kumar Poddar and the corporate guarantees of three public limited companies namely Mentmore Mercantiles Limited, Obelix Investments Limited and Achal Properties Limited.

7. Since there was a default on the part of the Petitioner company to repay the debts/dues of the Respondent bank. The Respondent bank had initiated a legal proceeding against the Petitioner company as well as the said guarantors in The Kolkata Debts Recovery Tribunal No. 1 by filing an application u/s 19 of the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The said application was duly registered as O.A. No. 135 of 2001, (Punjab & Singh Bank v. Snow View Properties and Ors.).

8. Subsequent thereto, the Respondent company had negotiated with the Appellant bank for the settlement of the alleged debts of the Respondent bank and ultimately it was mutually agreed between the parties and that the Respondent company would be required to pay a sum of Rs. 54 lacs towards full and final settlement of the claim of the Respondent bank within 31st March, 2006 and upon payment of such amount, all the securities held by the Respondent bank would stand released. The terms of such settlement would appear from a letter dated 25th March, 2006 which is set out hereunder:

1. That you will suffer a decree for the entire amount of suit with pendente lite and future interests till realization along with costs as prayed in the plaint;

2. The above decree shall be deemed to have been satisfied, if you pay a sum of Rs. 54 lacs latest by 30.3.2006;

6. Securities held will be released only after the full and final adjustment of the account;

7. Cases filed/pending against the bank, if any are to be withdrawn by you to the entire satisfaction of the bank.

9. The Petitioner company accepted the aforesaid terms and conditions stated in the said letter dated 25th March, 2006 and accordingly forwarded by an order bearing No. 084118 dated 29th March, 2006 under a covering letter dated 29th March, 2006 for a settled sum of Rs. 54 lacs to the Respondent bank towards full and final settlement of the Respondent bank's dues towards the protanto satisfaction in respect of the aforesaid credit facility account. After receipt of such settle payment the Respondent bank had filed an application and an affidavit before The Kolkata Debts Recovery Tribunal - I on 16th May, 2006 for the dismissal/withdrawal of the aforesaid legal proceeding being O.A. No. 135 of 2001, (Punjab & Sind Bank v. Snow View Properties Ltd. and Ors.). The said application was allowed by the learned tribunal and the proceedings pending before the learned tribunal was dismissed as withdrawn for non prosecution.

10. It is the case of the writ Petitioner/Respondent company that it was obligatory on the part of the Respondent bank to release the securities namely

the Original Lease Deed of the said premise, the Original Guarantee Documents executed by the individuals and corporate guarantors and the deed of hypothecation of the raw materials, goods and stocks immediately. It is further the case of the writ Petitioner/Respondent company that by several letters addressed to the Respondent company for release to the said security documents. The Appellant company did not pay any bid to return the original documents to the writ Petitioner even after such settlement.

11. The grievance of the Respondent company is that after the matter has already been settled between the parties, the bank cannot turn around and called upon the Respondent company to pay the dues of another company known as Dheklapara Tea Company Limited. The writ Petitioner Respondent company denied the connection and/or nexus with the said Dheklapara Tea Company Limited. It is further stated that it is the obligation on the part of the bank to take steps in the matter.

12. On the contrary, the bank has denied that the matter was settled between the parties. It is further stated on behalf of the bank that Sri Vikram Poddar son of Sri Jagadish Prasad Poddar was holding 96% share of Dheklapara Tea Company Limited. The said company opened a current account authorizing Sri Vikram Poddar son of Sri Sushil Kumar Poddar to open and operate a current account at Netaji Subhas road, Kolkata branch of the Appellant bank and subsequently the writ Petitioners obtained a loan from the Main Branch of the Respondent bank at 8 Old Court House Street, Kolkata by giving the title deed of Dheklapara Tea Gardens as security.

13. It is further stated that both the accounts were introduced by Sri Sushil Kumar Poddar and Shri Vikram Poddar who also stood as guarantors for payment of the outstanding dues with the Respondent banks.

14. It is further submitted that the operators were in control of the management of both the companies. It is further stated that the proceedings were also initiated by the Appellant bank against Dheklapara Tea Company Limited and a certificate has already been issued by the learned Kolkata Debts Recovery Tribunal No. II, Kolkata for recovery of Rs. 20,37,646.27 together with costs as assessed up to Rs. 28,000/- together with interest at the rate of 18.5% on quarterly compounded from 1st April, 2001.

15. It is further the case of the Appellant bank that the total outstanding amount of the said Dheklapara Tea Company Limited is Rs. 86,22,834.00 and the Respondent company is bound to pay the said amount. It is submitted that the Poddars are operating and controlling the activities of Dheklapara Tea Company Limited and as the same common person in Snow View Properties Ltd. and if the corporate veil is lifted the real person behind the scene can be revealed.

16. The Hon"ble First Court after hearing the parties passed the orders in terms of prayers (a) and (b) of the petition.

17. Being aggrieved by the said order and/or judgment the Appellant bank has filed this appeal.

18. Mr. Kalyan Kr. Mitra, learned Advocate, appearing on behalf of the Bank submitted that the direction of the learned Single Judge to the company for the bank is liable to return the securities to the company by due discharge of his duties upon acceptance of the entire conditions in terms of the offer letter dated 25th March, 2006 is bad in law and according to him such direction could not have been passed by the Hon"ble Single Judge or be a subject matter of Article 226 of the Constitution of India.

19. He further contended that the right to retain a mortgage deed a civil dispute and proper forum is Debts Recovery Tribunal (hereinafter referred to as "DRT") or Civil Court. He further contended that the writ Petitioner/ Respondent No. 1 is seeking to impeach contractual obligation in the Writ Court and according to him the Writ Court is not the proper forum. In support of his such contention he relied on the following decisions:

(i) Lekhraj Satramdas, Lalvani Vs. Deputy Custodian-cum-managing Officer and Others,

(ii) Kulchhinder Singh and Others Vs. Hardayal Singh Brar and Others,

(iii) Radhakrishna Agarwal and Others Vs. State of Bihar and Others,

(iv) Divisional Forest Officer Vs. Bishwanath Tea Co. Ltd.,

(v) Bareilly Development Authority and Another Vs. Ajay Pal Singh and Others,

(vi) State of U.P. and others Vs. Bridge and Roof Co. (India) Ltd.,

(vii) Kerala State Electricity Board and Another Vs. Kurien E. Kalathil and Others,

(viii) State of Bihar Vs. Kalika Kuer @ Kalika Singh and Others,

(ix) National Highway Authority of India Vs. Ganga Enterprises and Another, and

(x) Bareilly Development Authority Vs. Vrinda Gujarati and Others,

20. He further contended that the bank is not an authority within the meaning of Article 12 of the Constitution. In support of his such contention he submitted that no writ petition is maintainable against the bank and relied on a decision in the case of Sukhdev Singh, Oil and Natural Gas Commission, Life Insurance Corporation, Industrial Finance Corporation Employees Associations Vs. Bhagat Ram, Association of Clause II. Officers, Shyam Lal, Industrial Finance Corporation, .

21. He further contended that in the present proceeding does not involve questions of infringement or violation of any statutory provisions or statutory rights and that it would be an untenable and far fetched allegation that the Bank failed to perform a statutory obligation on their part. Therefore, according to him

Article 14 of the Constitution of India is not attracted in the instant proceedings.

22. He further tried to contend that the facts of the case cannot attract promissory estoppel against the bank on the given facts and he tried to impress upon us that the ratio decidendi held in the decisions of Motilal Padampat Sugar Mills Co. Ltd. Vs. State of Uttar Pradesh and Others, ; Commissioner of Income Tax (Central) Vs. B.N. Bhattacharjee and Another, and S Shrijee Sales Corporation and Another Vs. Union of India (UOI), , are not applicable in the present facts of the case.

23. He further contended that the terms of settlement set out in the bank's letter dated 25th of March, 2006 would show that there was no accord or satisfaction expressed by the bank.

24. On the contrary, Mr. Soumen Sen, learned Advocate appearing on behalf of the Respondent that the bank is not an authority within the meaning of Article 12 of the Constitution cannot be accepted and even in the decisions of the Apex Court it has been held to be State within the meaning of Article 12 of the Constitution (see M/s. Hyderabad Commercials Vs. India Bank and others, , where the Respondent bank was held to be an instrumentality of the State), the Bank itself has been held to be so in the decision of the Apex Court in Punjab and Sind Bank v. Mohinder Pal Singh, 2005 (12) SC 747. In view of that the contention of Mr. Mitra cannot be accepted by us and we held that the Hon"ble First Court correctly came to the conclusion that the bank is an authority within the meaning of Article 12 of the Constitution.

25. The objection which has been tried to be raised by Mr. Mitra that the Writ Court is not the proper forum and the matter should be decided by a Suit Court or by the DRT. We are not in a position to accept the contention of Mr. Mitra on the given facts and on the contrary we find that as has been held by this Court in Central Group and Ors. v. Calcutta Metropolitan Development Authority and Ors., reported in 1982 (2) CHN 90, where it has been held that:

46. The submissions of the Petitioners on this aspect of the case which I accept may be summarized as follows:

1. If a Petitioner seeks to enforce a purely contractual term, the Court normally does not entertain as application for such purpose under Article 226 of the Constitution of India.

But when one of the contracting parties is the State, and a challenge is thrown by the Petitioner alleging that the action is arbitrary, an attack to such an action under Article 14 of the Constitution of India is fully available.

3. The development of administrative law and activist dimension of Article 14 of the Constitution of India, as laid down in the International Airport Authority's case has brought out a distinction between a purely private right and a right of an individual as a member of the public vis a vis the State. If there is an arbitrary revocation of contract by the State, the contractor has two rights

available to him, namely, the Constitutional right as also the right under the contract. These two rights are available when there is a concluded contract, only the Constitutional right is available.⁴ It is not correct to say that the relief prayed for in the writ application amounts to the relief of specific performance. In such a case the Court is not really concerned with the mode or manner of performance. The only question that arises is whether action complained of amounts to an arbitrary action on the part of the State or not. If it is found to be arbitrary, then it should be struck down. The Court is not really concerned with the future performance of the contract. That will take its own course in accordance with law.

26. We accept the opinion expressed by the said decisions and held that the conduct and the act on the part of the bank would show that in spite of the letter written by them and the payments which were made by the Respondent/writ Petitioner the bank has acted arbitrarily, unfairly and unreasonably in not returning the securities and in the case of ABL International Ltd. and Another Vs. Export Credit Guarantee Corporation of India Ltd. and Others, , where the Hon''ble Apex Court held that in an appropriate case, a writ petition as against a State or an instrumentality of a State arising out of a contractual obligation is maintainable.

27. In our considered opinion in the instant case the Hon''ble Single Judge on the given facts rightly came to the conclusion that the action on the part of the bank is wholly arbitrary and comes on the ground of violation of Article 14 of the Constitution. Very recently the Hon''ble Supreme Court in Civil Appeal No. 6077 of 2010, (Zonal Manager, Central Bank of India v. Devi Ispat Ltd. and Ors.) where the Hon''ble Supreme Court held that:

9. In our opinion this question is no more res integra and is settled by a large number of judicial pronouncements of this Court. In K.N. Guruswamy v. State of Mysore, this Court held: (AIR pp. 595-96, para 20)

20. The next question is whether the Appellant can complain of this by way of a writ. In our opinion, he could have done so in an ordinary case. The Appellant is interested in these contracts and has a right under the laws of the State to receive the same treatment and be given the same chance as anybody else....

We would therefore in the ordinary course have given the Appellant the writ he seeks. But, owing to the time which this matter has taken to reach us (c consequence for which the Appellant is in no way to blame, for he has done all he could to have an early hearing), there is barely a fortnight of the contract left to go. ...A writ would therefore be ineffective and as it is not our practice to issue meaningless writs we must dismiss this appeal and leave the Appellant content with an enunciation of the law.

10. It is clear from the above observations of this Court in the said case, though a writ was not issued on the facts of that case, this Court has held that on a given set of facts if a State acts in an arbitrary manner even in a matter of

contract, an aggrieved party can approach the Court by way of writ under Article 226 of the Constitution and the Court depending on facts of the said case is empowered to grant the relief. This judgment in *K. N. Guruswamy v. State of Mysore*, was followed subsequently by this Court in the case of *D.F.O. v. Ram Sanehi Singh*, wherein this Court held: (SACC p. 865, para 4)

By that order he has deprived the Respondent of a valuable right. We are unable to hold that merely because the source of the right which the Respondent claims was initially in a contract, for obtaining relief against any arbitrary and unlawful action on the part of a public authority he must resort to a suit and not to a petition by way of a writ. In view of the judgment of this Court in *K.N. Guruswamy* case there can be no doubt that the petition was maintainable, even if the right to relief arose out of an alleged breach of contract, where the action challenged was of a public authority invested with statutory power.

(Emphasis supplied)

28. In *ABL International Ltd. and Anr.* (supra) the Hon"ble Apex Court held as follows:

15. The learned Counsel then contending that this Court will not entertain a writ petition involving disputed questions of fact relied on a judgment of this Court in the case of *State of Bihar v. Jain Plastics and Chemicals Ltd.* wherein this Court held: (SCC p. 218, para 7)

7. In our view, it is apparent that the order passed by the High Court is, on the face of it, illegal and erroneous. It is true that many matter could be decided after referring to the contentions raised in the affidavits and counter-affidavits, but that would hardly be a ground for exercise of extraordinary jurisdiction under Article 226 of the Constitution in case of alleged breach of contract. Whether the alleged non-supply of road permits by the Appellants would justify breach of contract by the Respondent would depend upon facts and evidence and is not required to be decided or dealt with in a writ petition. Such seriously disputed questions or rival claims of the parties with regard to breach of contract are to be investigated and determined on the basis of evidence which may be led by the parties in a properly instituted civil suit rather than by a court exercising prerogative of issuing writs.

16. A perusal of this judgment though shows that a writ petition involving serious disputed questions of facts which requires consideration of evidence which is not on record, will not normally be entertained by a court in the exercise of its jurisdiction under Article 226 of the Constitution of India. This decision again, in our opinion, does not lay down an absolute rule that in all cases involving disputed questions of fact the parties should be relegated to a civil suit. In this view of ours, we are supported by a judgment of this Court in the case of *Gunwant Kaur v. Municipal Committee, Bhatindaa* where dealing with such a situation of disputed questions of fact in a writ petition this Court held: (SCC p. 774, paras 14-16)

14. The High Court observed that they will not determine disputed question of fact in a writ petition. But what facts were in dispute and what were admitted could only be determined after an affidavit-in-reply was filed by the State. The High Court, however, proceeded to dismiss the petition in limine. The High Court is not deprived of its jurisdiction to entertain a petition under Article 226 merely because in considering the Petitioner's right to relief questions of fact may fall to be determined. In a petition under Article 226 the High Court has jurisdiction to try issues both of fact and law. Exercise of the jurisdiction is, it is true, discretionary, but the discretion must be exercised on sound judicial principles. When the petition raises questions of fact of a complex nature, which may for their determination require oral evidence to be taken, and on that account the High Court is of the view that the dispute may not appropriately be tried in a writ petition, the High Court may decline to try a petition. Rejection of a petition in limine will normally be justified, where the High Court is of the view that the petition is frivolous or because of the nature of the claim made dispute sought to be agitated, or that the petition against the party against whom relief is claimed is not maintainable or that the dispute raised thereby is such that it would be inappropriate to try it in the writ jurisdiction, or for analogous reasons.

15. From the averments made in the petition filed by the Appellants it is clear that in proof of a large number of allegations the Appellants relied upon documentary evidence and the only matter in respect of which conflict of facts may possibly arise related to the due publication of the notification u/s 4 by the Collector.

16. In the present case, in our judgment, the High Court was not justified in dismissing the petition on the ground that it will not determine disputed question of fact. The High Court has jurisdiction to determine questions of fact, even if they are in dispute and the present, in our judgment, is a case in which in the interests of both the parties the High Court should have entertained the petition and called for an affidavit-in-reply from the Respondents, and should have proceeded to try the petition instead of relegating the Appellants to a separate suit.

29. In these circumstances after considering the said decision it appears to us that at the instance of the bank the payments have already been made by the writ Petitioner and in our considered opinion that the bank tried to shift the blame on the shoulder of the Advocate who appeared on their behalf before the Tribunal cannot be accepted. The settlement proposal was sanctioned by the Head Office of the bank which was conveyed to the company by the bank. The basis of such terms would be evident from the letter dated 25th of March, 2006 the bank never denied the terms stated in the letter. The bank did not even took steps to return the amount paid on the basis of the settlement. In these circumstances we do not find that the decisions cited on behalf of the Appellant can be a help to the Appellant.

30. On the contrary we find that the submissions made on behalf of the

Respondent has substance and we accept the same. We do not find that there is any illegality or irregularity in respect of the order so passed by His Lordship in terms of prayer (a) and (b) to the petition. We only extend the time to the bank to refund the Title Deed which was kept by the bank as security within a period of three weeks from the date of this order.

31. Urgent xerox certified copy of this order, if applied for, be supplied to the parties subject to compliance with all requisite formalities.