(2010) 01 AHC CK 0283

In the Allahabad High Court

Case No : C.M.W.P. No. 12864 of 1975

Standard Nut Manufacturers and Another — APPELLANT

Vs

Collector/District Magistrate and Others — RESPONDENT

Date of Decision : 25-01-2010

Acts Referred:

Companies Act, 1956 — Section 617
Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 — Section 2

Citation : (2010) 5 AWC 5216

Hon'ble Judges : Virendra Singh, J;Sunil Ambwani, J

Bench : Division Bench

Advocate : Ratnesh Kumar Pandey, C.P. Ghildiyal, Ajit Kumar and R.A. Sharma, for the Appellant; A.K. Mishra, S.R. Verma and V.K. Singh, S.C., for the Respondent

Final Decision : Dismissed

Judgement

Sunil Ambwani and Virendra Singh, JJ.—This writ petition was filed on 2.12.1975, for a writ of mandamus directing the Respondents not to realise any amount from them as arrears of land revenue and to quash the recovery certificate and citation dated 19.10.1975 for recovery of Rs. 55,012.20 as the balance amount to be paid by the Petitioner under a hire purchase agreement dated 26.8.1970 with the U.P. Small Industries Corporation Limited, Sarvodaya Nagar, Kanpur.

2. After exchange of affidavits the writ petition was dismissed by a judgment dated 22.8.1995 for the reason that the U.P. Public Moneys (Recovery of Dues) Act, 1972 is applicable to the dues recoverable under the hire purchase agreement. The Petitioners filed Civil Appeal No. 7341-7343 of 1997 on the ground that the writ petition was decided in the absence of Appellant and their advocate. The Supreme Court, by its order dated October 15, 2003, set aside the judgment and requested the High Court to decide the matter on merits as expeditiously as possible. The writ petition was listed on 6.1.2004 and was dismissed for want of prosecution. The restoration application was allowed on

24.7.2008.

3. An amendment application filed on 27.7.2008 is still pending. In paragraph 16 of the amendment application, it is stated that on 13.2.2008 the Sub-Divisional Officer, Khurja, District Bulandshahr has issued an attachment order attaching house No. 272 of Petitioner No. 2 situate in Mohalla Laxmanganj, Khurja, District Bulandshahr for recovering Rs. 1,86,121 and expenses. The Sub-Divisional Officer, Khurja has fixed a public auction of the house to be held on 20.3.2008. It is stated in paragraph-18 that the house is valued at Rs. 75 lacs. The Petitioner No. 2, under compulsion of the authorities recovering the amount, deposited Rs. 1,10,000 with Collection Amin on 17.3.2008 vide receipt of the same date and a further amount of Rs. 1,66,022 vide another receipt of the same date totalling Rs. 2,16,622.

4. The Petitioners have prayed for adding ground Nos. (ix) to (xv) challenging the recovery and deposit of Rs. 2,16,622 under coercion and for misusing the Government machinery. They have also prayed to add prayer No. , (e) in the prayer clause in the writ petition for a direction to refund the entire amount with 18% interest, and with exemplary costs of Rs. 10 lacs. It is contended that the amendment application only seeks to bring the subsequent events on the record during the pendency of the restoration application. The amendment application is consequently allowed.

5. Brief facts giving rise to this writ petition are that Shri Govind'' Swarup Sharma-Petitioner No. 2 applied for financial assistance from U.P. Small Industries Corporation Limited (the Corporation) to set up a nut manufacturing factory. The Petitioner submitted a guarantee bond and deposited Rs. 11,440 towards earnest money and supervision charges and Rs. 2,400 as charges for supply of the raw material. The Petitioner then entered into an agreement dated 7.7.1970 with the Corporation. Some machinery was supplied by the supplier of the Corporation between August, 1970 to January, 1971. The bench grinder was not supplied until 23.1.1971. The Petitioner informed the Corporation on 25.1.1971 that the machinery supplied by the supplier is defective and is below standard, and that the complete plant has not been supplied, and issued reminders on 8.2.1971 and 22.2.1971.

6. The Petitioner once again informed the Corporation on 18.4.1971 that the machines have not been replaced and that the factory is suffering losses. On 9.6.1971 the Corporation informed the Petitioner that the technical staff of the Corporation will visit the premises. On 16.6.1971 the technical staff inspected the factory and found the machinery to be defective, below standard and not workable. The supplier by its letter dated 27.1.1972 informed the Corporation that it is ready to replace the defective machinery and charge lesser price and wanted approval of the Corporation. The supplier did not receive the approval of the Corporation and instead vide letter dated 7.3.1972, the Corporation asked the Petitioner to submit confirmation of proposal for replacement and charging lesser price for defective and below standard machinery. The Petitioner conveyed

the approval on 27.3.1972. Thereafter nothing was heard from the Corporation. A notice of demand was received for a sum of Rs. 13,829.30 on 23.6.1972. The Petitioner objected to the notice by his letter dated 3.7.1972 on which he was informed by the Corporation on 24.7.1972 that the matter is still under consideration. The Petitioner was asked to inform the Corporation whether the bench grinder has been supplied and whether three defective electric motors have been returned back by the Petitioner to the supplier. The Petitioner wrote back to the Corporation on 8.8.1972, that the bench grinder has not been received and three defective motors have been sent back to the supplier. Again nothing was heard, and that on 15.11.1972 a notice of demand of Rs. 19,931.53 was received and that thereafter a certificate of recovery was sent by the Collector, Bulandshahr to recover Rs. 34,000 from the Petitioner.

7. The Petitioner wrote to Minister for Industries Department, U.P. Government on 31.12.1973 and also wrote to the Corporation on 2.1.1974 that it had to suffer losses due to supply of defective and incomplete machinery. The Corporation asked the Petitioner to pay a sum of Rs. 6,000 for rescheduling the instalments. The Petitioner paid Rs. 6,000 but that accounts were not settled and that again a demand of Rs. 38,340 was sent to the Petitioner and the recovery certificate was pressed. The Petitioner requested that the Corporation may dispose of the machinery. The Corporation by its letter dated 17.11.1975 refused the permission and offer to sell the machinery.

8. The recovery has been challenged on the ground that the dispute was not settled. The Petitioner could not enter into production on account of supply of defective machinery and that if the machinery is sold, which is valued and at not less than Rs. 50,000 to Rs. 60,000, the entire amount will be recovered for which the Petitioner has already deposited Rs. 18,000.

9. In the counter-affidavit of Shri G.A. Khan it is stated that the Petitioner applied for purchase of machinery under a hire purchase agreement. The supplier was exclusively responsible to the Petitioner to supply proper machinery and that the Corporation was required to pay 90% of the purchase amount. The balance amount of 10% was to be paid after satisfactory certificate of working of machines was given by the Petitioner. The supply was made in the year 1970. The first instalment was due on 26.8.1971 and thereafter the amount was to be paid in eight instalments in five years. In spite of various demands the Petitioner did not pay anything except for initial deposit and service charges. When the recovery certificate was issued, the Petitioner deposited Rs. 3.600 in Tehsil Khurja and a request was made that a sum of Rs. 2,400 be credited towards the hire purchase agreement, out of the price of the raw material for rescheduling the payment. In paragraph 16 of the counter-affidavit, it is stated that the letter written by the Petitioner on 27.3.1972, was to the effect that unless the difficulties are removed in the machinery or they are replaced, the Corporation was not entitled to charge interest. As per terms of the agreement the instalments had fallen due. In para 22 it is stated that the supplier was the firm

of the choice of the Petitioner and in accordance with the agreement, if there was any defect in the machinery, the Corporation was not responsible. The defect pointed out by the Petitioner in the machines was a dispute between him and the supplier. In para 28 it is stated that on the information that in spite of the offer made to the Tehsildar or the District Magistrate or the Corporation the Petitioner did not surrender the possession of the machines.

10. A copy of the hire purchase agreement was required to be filed by the Corporation. A supplementary counter-affidavit was filed annexing the agreement dated 26.8.1970. The hire purchase agreement provides in Clause 2(a) that the hirer shall on receipt of the property, inform within 30 days thereafter to the owner the place where it has been installed or kept, and the hirer shall not shift or remove the same from such premises without obtaining prior permission in writing of the owner. Clause 2(b) provides that the hirer shall keep the property in his own custody at the address given in the agreement in good order, and repair and insured in the name of the owner against fire, loss, damage or destruction and will not sell, mortgage, pledge, assign, let or otherwise deal with or part with the possession of the property. The remaining terms of the hire purchase agreement relate to the terms of the repayment. The description of the six machines to be financed by the Corporation was given on page 3 of the agreement. On the same page in the next paragraph the agreement witnesses as follows:

AND WHEREAS the property described in the schedule hereto has been purchased on the basis of the choice and desire of the Hirer and has been selected at his instance and is subject to the usual warranties of the supplier thereof regarding its type, make, specifications, capacity etc., with which the owner is or shall in no way be concerned or liable.

11. At page 4 Clauses 4(c) and 5 of the agreement are also relevant and are quoted as below:

4 (c) The Hirer shall not be entitled to claim any damages/compensation for such termination of the agreement and taking over of possession of the property by the owner or for any loss, damage, inconvenience that the hirer may directly or indirectly incur, as a result of such termination of agreement or taking over the said property by the owner.

5. The hirer shall be solely responsible for the proper upkeep of the property as detailed in the schedule. He shall look after the property by carrying out periodical repairs and normal overhaul. The owner, shall not be responsible for any repairs, whether major or minor and the repairs and upkeep expenses shall be borne solely by the hirer.

The owner will have the right to bring to the notice of the hirer through its inspecting staff/agents any deficiency in respect of the above and in the event of the Hirer failing to remedy such deficiency when called upon to do so the owner shall have the right to terminate this agreement and retake possession of the said property without prejudice to any claim of the owner for arrears of hire-rent or damages for breach of this agreement, and the hirer shall not be entitled to claim any damages/compensation.

Page 7 of the agreement provided in Clause 11(b) as follows:

(b) The property having been purchased by the Owner at the instance of the Hirer and recording to the choice and desire of the Hirer, if the Hirer shall of his own accord return the property to the Owner during the period of operation of this agreement the Owner reserves the right to sell the same by private auction or by any other means in its discretion, and if the resale value of the property falls short of the Hire Purchase Price less the instalments (excluding interest on instalments) paid by the Hirer, the resultant loss shall be made good by the Hirer by paying the amount to the Owner within thirty days of demand.

12. Clause 12 provides for return of the property, if the agreement is terminated and Clause 15 provides for reference of the disputes or differences to the arbitration of the nominee of the Director of Industries of the State of U.P. Clauses 12 and 15 are quoted as below:

12. In the event of the hiring being determined by the Hirer or by the owner under the provisions of this agreement, the Hirer shall forthwith return the said property to the owner, and the owner and its servants shall be entitled without any notice to enter upon any premises where the said property may be and seize and take possession thereof and the determination of the hiring as aforesaid shall not affect or prejudice any claim the owner may have against the Hirer for arrears of hire payments or for damages for breach of this agreement or the owner''s right to enforce such claim by action or otherwise.

15. That any dispute or difference which may arise between the parties with regard to the construction, meaning and effect of this deed or any part thereof or any other matter under this agreement shall be referred to the arbitration of the nominee of the Director of Industries of the State of Uttar Pradesh.

13. Shri Ajit Kumar, learned Counsel for the Petitioner submits that the machines were supplied by the supplier of the Corporation. The machines were defective and thus the Petitioner could not carry on the production. He submits that the Corporation had carried out inspection and had agreed that the machinery be returned and new machines be purchased at a lesser price. The Corporation however illegally without complying with its promise initiated recovery of the hire purchase amount. The Petitioner was all along ready and willing to return the defective machinery and for supply of the machinery in accordance with the specification for manufacture.

14. The terms of the agreement clearly provided that the machinery shall be supplied by the supplier of the choice of the hirer. The ownership of the property however shall be with the Corporation. The Petitioner has not pleaded or brought any material on record to show that no production was carried out in the factory

and that he suffered any losses. The profit and loss account and the balance-sheets of the relevant period have not been brought on record. The correspondence clearly shows that when the instalments fell due, the Petitioner as a hirer started protesting about the quality of the machinery. It is no doubt true that inspections were carried out and some defects were found, but it is difficult for the Court in the writ petition to decide whether the machineries were in such condition, that no production was possible or that the Corporation was at fault. The terms of the agreement did not provide for any negligence of the Corporation, in case of supply of defective machineries by a supplier of the choice of the Petitioner as hirer. At one stage the Petitioner offered to surrender the machines but that there is no further correspondence to show that the offer actually materialised.

15. The amount due under the hire purchase agreement to the notified Corporation can be recovered under the U.P. Public Moneys (Recovery of Dues) Act, 1972. Section 2 of the Act provides as follows:

2. Definitions.--In this Act, unless the Context otherwise requires-

(a) "Corporation" means the Uttar Pradesh Financial Corporation established under the State Financial Corporations Act, 1951, and includes any other Corporation owned or controlled by the Central Government or the State Government and specified in a notification issued in that behalf by the State Government in the Official Gazette ;

(b) "financial assistance" means any financial assistance--

(i) for establishing, expanding, modernising, renovating or running any industrial undertaking, or

(ii) for purposes of vocational training, or

(iii) for the development of agriculture, horticulture, animal husbandry or agro-industry, or

(iv) for purposes of any other kind of planned development, or

(v) for relief against distress ;

(c) "Government Company" means a Government Company as defined in Section 617 of the Companies Act, 1956 ;

(d) "Industrial concern" has the meaning assigned to the expression in the State Financial Corporations Act, 1951, as amended from time to time ;

(e) "Industrial undertaking" includes any undertaking for the manufacture, preservation, storage or processing of goods, or mining or the hotel industry, or the transport of passengers or goods, or the generation or distribution of electricity or any other form of power or for the development of any continuous area of land as an industrial estate ;

Explanation.--The expression "processing of goods" includes any art or process for producing, preparing or making an article by subjecting any material to a manual, mechanical, chemical, electrical or any other like operation ;

(f) "banking company" means the State Bank of India constituted under the State Bank of India Act, 1955, a subsidiary bank as defined in the State Bank of India (Subsidiary Banks) Act, 1959, a corresponding new bank constituted under the Banking Companies (Acquisition and Transfer of Undertakings) Act, 1970, or a banking company as defined in the Banking Regulation Act, 1949, or a financial bank (or Central Bank as defined in the Uttar Pradesh Co-operative Societies Act, 1965 not being a land development bank) ;

(g) "State-sponsored scheme" means a scheme sponsored by way of financial assistance by the State Government under which the State Government either advances money to a banking company or a Government Company for the purpose of disbursing loans, advances or grants or for purposes of sale of goods on credit or hire-purchase or guarantees or agrees to guarantee the repayment of a loan, advance or grant or the payment of the price of goods sold on credit or hire purchase (and includes any other scheme of financial assistance, by a banking company or a Government company, which is declared to be a State sponsored scheme by the State Government by notification in the Gazette).

16. We further find that if there was any dispute, the same could be referred to the nominee of the Director of Industries. The Petitioner did not raise any dispute under the agreement to be decided by the Director of Industries. We do not find it appropriate, in the facts and circumstances of the case to refer the matter for arbitration or to relegate the Petitioner to the alternative remedies at this stage.

The writ petition is dismissed.

