

(2009) 02 PAT CK 0020
In the Patna High Court

Suraj Kana Pharmaceutical

APPELLANT

Vs

Bihar State Financial Corporation and Another

RESPONDENT

Date of Decision : 17-02-2009

Acts Referred:

Citation : (2010) 7 RCR(Civil) 12

Final Decision : Allowed

Judgement

Navaniti Prasad Singh, J.—Counter-affidavit has been filed by the Bihar State Financial Corporation. The petitioner deems it not necessary to file a rejoinder as basic facts, as alleged in the writ petition, stand admitted. With consent of parties, the writ petition is being disposed of at this stage itself.

2. Petitioner has come to this Court against action sought to be taken by the Corporation to sell about 5 kathas of land at Digha in Patna belonging to one of the partners of the petitioner's firm which was mortgaged to the Corporation to secure the financial accommodation.

3. The petitioner-firm consisted of three partners. They were all new entrepreneurs who were allured into setting up a small scale industry unit at Digha, Patna. They applied for term loan to the Corporation and the Corporation, it is not disputed, after project appraisal, sanctioned a term loan of Rs. 13.06 lacs vide sanction letter dated 22-5-1990. The project appraisal report and the sanction letter is Annexure-1 to the writ application. Pursuant to the aforesaid sanction, petitioner and his partners were asked to create mortgage for securing the loan to be disbursed and in the said mortgage, one of the partners; gave 5 kathas of his land in mortgage to the Corporation and, accordingly, documentations were done on 15-4-1991. Out of the total sanctioned amount, pursuant to the project appraisal of Rs. 13.06 lacs, petitioner was disbursed only Rs. 4.07 lacs which was even less than one third the promised sanctioned amount. It is for the default in repayment of this amount with interest and penal interest which has now mounted to excess of Rs. 60 lacs, the proceedings have been initiated.

4. Petitioner and his partners, {hereafter, invested about Rs. 9 lacs from their own pocket and, thereafter, tried to persuade the Corporation to disburse the rest of the sanctioned amount. Regrettably, even though petitioner and his partners had undertaken the project on the assurance of the sanctioned loan and invested about Rs. 9 lacs from their pockets as well, the Corporation now informed the petitioner on 17-6-1993 that due to financial constraint through which the Corporation was going, the Corporation was not in a position to disburse the balance sanctioned loan and petitioner was free to approach any Other commercial bank. This left the petitioner high and dry. It had no funds of its own to complete the industrial project. Midway, the Corporation backed out and the project was never completed. The commercial Banks, apart from being uneconomic, were not ready to advance any money on such industries in Bihar at that time. In paragraph-10 of the counter-affidavit, these basic facts have not been disputed by the Corporation which goes to the extent of saying that petitioner was ultimately advised to refund the loan by selling the assets as created. Nowhere Corporation has taken stand that it was ready to abide by its promise to disburse the full sanctioned amount as per the project approval or that the disbursement was stopped because of any default on part of the unit or its partners.

5. Having abandoned and left the petitioner as an orphan child, now the Corporation wants its pound of flesh from the petitioner, As against the partial disbursement of Rs. 4.07 lacs, it now demands a refund/ repayment of Rs. 60 lacs. This is what shocks this Court. First, the Corporation abandons the project, resiles from its promise and turns the situation upside down and now puts the petitioner on the block. To my mind, there can be nothing more arbitrary than this.

6. In this connection, I cannot improve upon what the Apex Court had to say in the case of Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., , paragraph-3 of which is quoted hereunder:

How a public sector Corporation set up to give impetus to industrial development of the country, a promise of planned economy aimed at job expansion to liquidate the curse of unemployment, and larger production helping price stabilization acts in a manner contrary to its *raison d'être* and becomes counter-productive is aptly illustrated by the facts of this case.

7. Before dwelling into the legal issue, it would be useful to note the object with which the State Financial Corporation Act, 1951 was enacted. Bihar State Financial Corporation (hereinafter referred to as the Corporation) has been established u/s 3 of the said Act and is, thus, a statutory Corporation. The Act was passed in order to facilitate providing financial credit to industrial undertakings which fall outside the normal activities or commercial activities of commercial Banks. Earlier part of this was covered by the Industrial Financial Corporation Act 1948. The State Governments wished that similar Corporation should also be set up in the State to supplement the work of Industrial Financial

Corporation and would take up cases that were outside the scope of the Industrial Financial Corporation. The Act was amended from time to time s.0 that the industrial concerns engaged in small scale and cottage industries not having sufficient tangible assets and who were unable to be serviced by commercial Banks may avail themselves of the financial accommodations from the State Financial Corporations which would encourage the tempo of industrialization. Basically, it appears that it was accepted that new entrepreneurs, small entrepreneurs lacking in experience, lacking in material resources, would not be favoured for loans by commercial Banks as commercial Banks operate solely for profit and, thus, seek secured investments, the Financial Corporations were to fill this gap and, thus, the object of their finance was not money making or commercial but purely in aid of giving impetus to industrialization, employment and other direct and indirect benefits thereof quite contrary to the commercial banks. Of course, doling out money for the asking was not their charter but giving loans to entrepreneurs who would not otherwise have access to the same from commercial Banks and following up of setting up of units aiding and assisting the entrepreneurs was the primary object of the Corporation.

8. On all counts, this case illustrates how counter-productive the whole exercise was. The facts, noted above, would clearly show that much less than giving any incentive to the petitioner, it has become a curse for the petitioner and even if its entire properties including personal belonging are sold, not even a part of the debt sought to be recovered, would be recovered. What is most curious is that when petitioner was informed by the Corporation as far back as in 1993 that Corporation was not in a position to advance the sanctioned loan any further and consequently petitioner defaulted in its repayment liability of part loan already advanced, the Corporation sat back and let the loan account multiply as if the Corporation was building asset of if ability due to it. For over decade and a half, it took no effective steps to precipitate the situation and when the liability stood increased from a meager amount of Rs. 4 lacs to an unsurmountable amount of Rs. 60 lacs, it wakes up and realizes its responsibility to recover its dues and goes about auctioning properties to recover the same. It advises the entrepreneur to sell the assets of the unit to liquidate its dues defeating the very purpose and object for which the Corporation was created.

9. As noticed by the Apex Court in the case of Gujarat State Financial Corporation Vs. Lotus Hotels Pvt. Ltd., , the petition had a remedy through writ proceedings under Article 226 of the Constitution of India for specific performance against the Corporation but in addition thereto, as noticed by the Apex Court itself, it also had remedy for damages. Much water has flown through Ganges since the said decision and now it is established that even for damages, writ proceedings are maintainable. One may usefully refer to the decision rendered in the case of The Chairman, Railway Board and Others Vs. Mrs. Chandrima Das and Others, .

10. Under the Laws of Contract, there is a principle known as "fundamental

breach". A fundamental breach is a breach by either party of a term which was fundamental to the contract. The contract being based on the premise of the fundamental, it is akin to foundation of the contract. Here the entire foundation of contract as between the petitioner and the Corporation was that the Corporation, on appraisal of the project report by Its experts, was satisfied that to make the petitioner unit, viable, it needed certain financial assistance and once the unit was viably established, it had a viable financial resource to repay the debt incurred. Thus, the fundamental basis of the contract was the fulfillment of obligation on part of the Corporation in disbursing the full amount of sanctioned loan in absence whereof nothing could move forward for the implementation of the contract the later part of which was obligation to repay. This fundamental premise on which based was the contract, was breached by the Corporation itself. Once this fundamental basis is breached by the Corporation itself, admittedly not because of any default on part of the petitioner but solely because of inability on part of the Corporation to perform its part of the contract, the contracting parties are relieved of their obligations which are reciprocal because of the fundamental breach. One party, who has committed the fundamental breach, cannot enforce and ask the other party to perform his part of the obligation without fulfilling its own obligations. What best the Corporation can now do is to ask the petitioner to repay the principal amount advanced to it because if Corporation asked for interest and penalties (penal interest) which are not small by any means and are compounded then the petitioner has a right to sue the Corporation for damages in equal terms.

11. This Court is, thus, of the view that permitting the Corporation to enforce its statutory right to recover its dues based on the fundamental premise which the Corporation itself breached would be unfair, unjust, arbitrary, capricious and illegal and, thus, clearly violative not only of the contractual obligations binding the parties but would be equally violative of Article 14 of the Constitution Of India. The Corporation was set up with the object of encouraging industrial growth and encouraging new entrepreneurs in the State. It miserably failed to do the same. Now it cannot turn around and say that I defaulted in my obligation but I will bind you to your obligations. Thus, the action of the Corporation in trying to auction the properties of petitioner is wholly arbitrary and cannot be sustained by this Court.

12. Here, I may notice that as late as in 2005, the Corporation came up with a one Time Settlement Scheme 2004. Petitioner even at that stage, being desirous of getting out of the debt trap where an initial loan of Rs. 4.07 lacs now mounted to merely Rs. 60 lacs, offered to settle the debts under the said OTS 2004. It is not disputed that complying with the norms of application as set therein, petitioner deposited upfront money and made an application thereunder. Under the OTS Scheme, it is not disputed that it was the Corporation which had to communicate to the petitioner the time and manner in which the balance amount of the settlement had to be paid. Petitioner has categorically stated that there was no response to the petitioner or its partners in respect of petitioner's

application. In the counter-affidavit what is stated is that the response was made by registered letter dated 10-8-2005 but the same was returned with postal remark not traceable. It is then stated that office peon was sent who tried to serve the order on the father of the petitioner who refused to receive the same. Then again order rescinding the settlement was also sought to be communicated to father of one of the partners who naturally refused to receive the same. Thereafter the OTS 2006 came, notice whereof is alleged to have been sent by the Corporation at the Unit's address which Unit never came into being or functioned, thus, declaring petitioner a chronic and habitual defaulter, the properties are being auction sold.

13. In view of finding of fundamental breach having been committed by the Corporation itself and the consequence being that the petitioner is relieved of his obligation under the same very contract, equities would be settled if the petitioner pays an amount of Rs. 10 lacs to the Corporation as against Rs. 4.07 lacs advanced by the Corporation in part of the sanctioned amount. The payment of the Rs. 10 lacs would be completed by the petitioner in such installments as the petitioner may think fit and proper starting from 1st of March 2009 up to 31st of December 2009. If by 31st of December 2009, petitioner fails to account for and deposit Rs. 10 lacs, so directed, the Corporation would then be free to take steps to recover the balance amount of the Rs. 10 lacs in accordance with law from the petitioner or any of its partners. Till such time, Corporation is restrained from taking any coercive steps as against the petitioner or its partners. Once the payment of Rs. 10 lacs, as aforesaid, is made, Corporation would immediately hand back the documents of title after clearing all charges free from encumbrance to the petitioner or its partners as the case may be.

14. The writ application, with the aforesaid observation and direction, stands allowed.