

(2009) 03 KL CK 0066

In the High Court Of Kerala

Case No : Writ Petition (C) No. 2666 of 2009

Usmatech Taxtile Engineers Pvt Ltd.

APPELLANT

Vs

The Branch Manager, K.F.C. Ltd. and Others

RESPONDENT

Date of Decision : 06-03-2009

Acts Referred:

Constitution of India, 1950 — Article 226

State Financial Corporations Act, 1951 — Section 29

Citation : (2009) 2 KLJ 83

Hon'ble Judges : Antony Dominic, J

Bench : Single Bench

Advocate : C.C. Thomas, for the Appellant; S. Sreekumar, for the Respondent

Judgement

Antony Dominic, J.—Prayers in this writ petition are to quash Ext. P19 and declare that the petitioner Company is entitled to the benefit of Exts. P13 Recovery Policy for the Financial Year 2007-08, (hereinafter referred to as the One Time Settlement (OTS) scheme) as amended by Ext. P14, announced by the 2nd respondent, based on Ext. P8 application made by the petitioner on 12-12-2007.

2. The petitioner is a company incorporated under the Companies Act, 1956. Pursuant to applications made by the Company, on 29-12-2000 and on 09-11-2001, the respondents had granted loan for a total amount of Rs. 97.13 lakhs and for the security of which, the Company had mortgaged 1.25 acres of land and the improvements therein and also the residential property of the Managing Director, as additional collateral security. Though by about 2000, production was commenced in the factory set up by the Company, from the records it is evident that consequent on the losses suffered, the factory was closed in 2004 and that position continues even now. While so, payments were defaulted and finally, Ext. P1 application was made by the Company on 03-12-2005, requesting that it be given the benefit of OTS Scheme to liquidate the liability. By Ext. P2, the respondents informed the petitioner that the request

could not be considered for non-payment of the prescribed advance of 10%. At that stage, the Company approached this Court by filing WP(C) No. 11393/2005. That writ petition was disposed of by Ext. P3 judgment directing the respondents to consider Ext. P1, without insisting on remittance of the 10% as indicated in Ext. P2. Accordingly, the request of the Company for the benefit of OTS scheme was considered and by Ext. P6 dated 29-12-2006, the petitioner was informed that its total liability was Rs. 129.27 lakhs and as they had offered only Rs. 28.58 lakhs, the offer for settlement was unacceptable.

3. Again the petitioner challenged Ext. P6 before this Court in WP(C) No. 5271/2007. In that writ petition this Court passed Ext. P7 order dated 28-09-2007 directing the Company to make an immediate payment of Rs. 40 lakhs and it was also directed that within six weeks from 01-10-2007, the balance amount due to the Corporation will also be paid. Further, the petitioner was also given the freedom to make an application seeking the benefit of OTS scheme, and it was directed that if payment was made as ordered, the application will be considered and the payment made will be given credit to the amount quantified towards the OTS amount.; The petitioner states that thereupon, Rs. 40 lakhs was paid and that they made Ext. P8, a request for the benefit of QTS scheme, praying inter alia for the adjustment of Rs. 40 lakhs paid in pursuance to Ext. P7 order. Subsequently, again, Ext. P9 interim order was passed, directing a further remittance of Rs. 60 lakhs, as offered by the petitioner, and it was also directed that the same should also be given credit, once OTS amount is quantified. It is admitted that this payment was made by the petitioner.

4. Again Ext. P10 order was passed by this Court, where taking note of the tentative quantification of Rs. 130 lakhs that the Corporation had made in the meanwhile, and holding that after giving credit to Rs. 1 crore already paid, the balance OTS dues, which was remaining to be paid, was only Rs. 30 lakhs, this ordered that the petitioner will be permitted to sell the industrial shed and machineries and thereafter, one the remittance of the balance Rs. 30 lakhs, the shed and the machinery will be allowed to be removed from the site. It is now admitted by both sides that as against Rs. 30 lakhs ordered to be paid in Ext. P10, only Rs. 3.4 lakhs was paid. True, the learned Counsel for the KFC has a case that by making payment of Rs. 3.4 lakhs, the petitioner removed the shed and machineries, but however, this is disputed by the petitioner.

5. Be that as it may, finally the Corporation issued Ext. P11, its final decision on Ext. P8 proposal made by the petitioner for the benefit of OTS scheme, intimating that as on 01-05-2008, the petitioner's liability was Rs. 157.58 lakhs and that in terms of Ext. P13, the Recovery Policy for 2007-08, the petitioner was entitled to a concession of only Rs. 4.73 lakhs. WP(C) No. 5271/2007 was finally disposed of by this Court by Ext. P12 judgment. Here, it should be started that in the above writ petition, the Corporation was justifying Ext. P11 giving a concession of only Rs. 4.73 lakhs to the petitioner, relying on Ext. P13, the OTS Scheme, on the basis of which the petitioner was classified under D2 category.

According to the Corporation, those defaulters, who are classified under D2 category under Ext. P13, the Recovery Policy 2007, were eligible for a maximum waiver of 50% of the penal interest only, and that in spite of it, the petitioner was given waiver of the entire penal interest viz. Rs. 4.73 lakhs. Contradicting this assertion of the Corporation, the petitioner, along with I.A. No. 9490/2008, produced circular No. 59 dated 01-12-2007, which is Ext. P14 herein, by which the Recovery Policy 2007 (Ext. P13) was amended and providing that those defaulters falling under D1 & D2 categories are also entitled to additional benefits as per the OTS scheme.

6. While disposing of WP(C) No. 5271/2007, these contentions were dealt with by this Court in paragraphs 4 & 5 of the judgment, a copy of which is Ext. P12 in this writ petition. Thereafter taking into account the fact that Ext P11, disposing of Ext. P8 application made by the petitioner for OTS scheme, was issued without taking into account the circular No. 59 dated 01/12/2007, this Court held that Ext. 11 deserves to be invalidated for that reason and that the matter needs to be re-considered. On this basis, WP(C) No. 5271/2007 was disposed of by Ext. P12 judgment dated 19-11-2008 with the following directions:

8. The request of the petitioner for OTS made by Ext. P31 application dated 12-12-2007, shall be reconsidered by the Corporation in the light of Recovery Policy dated 05-09-2007 as amended by Circular No. 59 dated 01-12-2007 and in the light of the rules untrammelled by Ext. P16 and order dated 14-05-2008. On such reconsideration, if the petitioner is found to be eligible for the benefit, the liability shall be quantified and from the amount that is quantified to be payable, Rs. 1 Crore paid by the petitioner pursuant to orders dated 28-09-2007 and 17-03-2008 and Rs. 3.4 lakhs paid on 23-10-2008 towards the value of the machinery sold shall be given credit. Thereafter, the balance as found due will be demanded from the petitioner, which shall be paid also.

9. It is directed that both parties shall maintain status quo in regard to the assets, until a decision is taken, as ordered above. It is also directed that the Corporation shall decide the matter in the manner as directed, as expeditiously as possible, at any rate within 6 weeks of receipt of a copy of this judgment.

7. In pursuance to Ext. P12 judgment, the petitioner made Ext. P15 representation and finally the representation has been considered and Ext. P19 order dated 16-01-2009 has been issued. In so far as the claim of the petition for the benefit of Circular No. 59 (Ext. P14) is concerned, the same has been dealt with in Ext. P19 in the following manner:

As far as the first condition is taken, it cannot be said that promotes are unable to run the unit. The unit is owned by private Limited Company having three Directors. The company and its Directors are affluent and is borne out of the fact that the company could raise Rs. 40 lakhs as per the order dated 28-09-2007 in WP(C) No. 5271 /07 and remitted on 06-10-2007 without creating any liability on the E.M. Property. Thereafter another sum of Rs. 60 lakhs was paid on

25-03-2008. This shows that the company has sufficient liquidity and could run the unit. Moreover the company has not contention before the Hon'ble High Court or before the OTS committee that the company is unable to run the unit. No explanation much less satisfactory has been made either in the written request dated 12-12-2007 for OTS benefit or at the time of personal hearing that company has paid Rs. 103.40 lakhs and it is entitled to OTS. Hence the company does not fall under Clause (a).

Admittedly, Clause (b) does not apply as none of the directors are sick or dead. Admittedly Clause (c) it is pertinent to refer to the petition filed by the company in the Hon'ble High Court in the bail application that the value of assets mortgaged to the Corporation is more than Rs. 4 Crores. The company could raise Rs. 40 lakhs on 06-10-2007 in pursuance of order dated 28-09-2007 and anr sum of Rs. 60 lakhs on 25-03-2008. This shows that the company and its directors are not in financial difficulties more over one of the director is a leading Doctor practicing in reputed Hospitals. At the time of personal hearing also the company had no case that the company or its Directors are in financial difficulties.

As far as Clause (d) the company has not pointed out any genuine reasons beyond its control. Nothing has been stated at the time of hearing to give the benefit of Clause (d) as well.

It is challenging Ext. P19 and seeking the reliefs mentioned earlier, this writ petition has been filed.

8. The learned Counsel for the petition challenges Ext. P19. According to him, the petitioner challenges Ext. P19. According to him, the petitioner is entitled to the benefit of Clause (a) & (d) of Ext. P14, Circular No. 59, amending Ext. P13 Recovery Policy for the year 2007-2008 It is stated that Ext. P19 reflects that the endeavour was only to reject his claim for the benefit of OTS scheme.

9. Counter affidavit has been filed by the respondents. According to the respondents, OTS benefit is given considering the repaying capacity and the value of the assets of the Company. It is stated that the Directors themselves have declared that the Company has assets of more than Rs. 4 Crores and this statement is said to have been made in a bail application filed by them before this Court. They have also produced Exts. R1(a) R1(b) and R1(c) containing the details of the assets of the Managing Director and two Directors of the petitioner Company. It is stated that these documents disclose that these persons are holding substantial assets and therefore, they cannot claim the benefit of OTS scheme, which is normally available to the persons, who are indigent.

10. It is stated that despite all these, the Corporation categorized the petitioner under D2 category as per the OTS Scheme and extended the benefit of full waiver of penal interest. In so far as the benefit of Clause 1(a) of Ext. P14 claimed by the petitioner is concerned, reference is made to Ext. R1(d), the bio-data of the Managing Director of the Company, and it is contended that the Managing Director is a technically competent person capable of running the

industrial unit. According to them the closure of the unit does not indicate the inability to run the unit. In so far as Clause 1(b) of Ext. P14 is concerned, it is stated that the Directors are very much alive that the petitioner has no case that any of its Directors are sick. In so far as Clause 1(c) of Ext. P14 is concerned. It is contended in the counter affidavit, that the petitioner has no case that the company as well as the Directors are not financially sound and that on the otherhand they possess assets worth crores. In so far as Clause 1 (d), it is stated that the petitioner could not bring out any genuine reason in order to attract this Clause. In short, what is stated in the affidavit is that the petitioner is not entitled to any further benefit than what has already been extended by the Respondents.

11. The learned Counsel for the respondents also placed reliance on Clause 17 of Ext. P13 providing that the amounts prescribed for settlement in the table are only minimum amounts and that all concerned shall negotiate for higher amounts depending on the value of available securities, solvency and repaying capacity of the borrowers/guarantors/co-obligant legal heirs. Reliance was also placed on the judgment of the Apex Court in U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, and Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, . The learned Counsel also placed reliance on the Division Bench Judgment of the Allahabad High Court in Mahesh Chand Agarwal and Smt. Kanak Agarwal Vs. Union of India (UOI), Bank of India, Agra Branch (7250), The Collector and Tahsildar, . According to him, Ext. P14 is only a guideline conferring discretionary power on the Corporation and that the benefit of the scheme cannot be claimed as a matter of right and that too by taking recourse to a writ of mandamus.

12. I have considered the submissions made by both sides.

13. Before Ext. P12 Judgment was rendered by this Court in WP(C) No. 5271/2007, the Corporation had already assessed the eligibility of the petitioner for the benefit of OTS scheme on the basis of Ext. P13 the Recovery Policy for the financial year 2007-08. Applying the standards laid down in Ext. P13 scheme, the Corporation had classified the petitioner under D2. On this basis, the Corporation assessed the eligibility of the petitioner was entitled to waiver of 50% of the penal interest. This was communicated to the petitioner as per Ext. P11 dated 14-05-2008. Therefore, the fact that the petitioner was eligible for the benefit of Ext. P13 scheme and that the petitioner was entitled the benefit to those categorized under D2 cannot be disputed at this stage.

14. However, when the eligibility of the petitioner was assessed and Ext. P11 was issued in May, 2008, the Corporation did not take into account the amendment made to Ext. P13, by Ext. P14 dated 01-12-2007 and in fact. As per this amendment, those who are categorized under S2, D1 and D2 were also eligible for the benefit of OTS scheme provided they satisfy any of the four conditions specified in paragraph 1 of Ext. P14 which reads as under:

1 It is decided to extend the OTS benefit to S2, D1 & D2 cases also in the best interest of the Corporation on satisfying any of the following conditions:

- (a) the promoter(s) is/are unable to run the unit
- (b) Owners/Co-obligants are dead or sick
- (c) Owners/co-obligants are in financial difficulties and
- (d) Other genuine reasons, beyond the control of the entrepreneur/s legal heirs.

The claim of the petitioner is mainly for the benefit of Clause 1(a) of Ext. P14, which extends the benefit of OTS scheme to those classified under D2 category, provided the promoter is unable to run the unit.

15. In this case, the admitted factual position is that though the Company commenced production in 2002, the factory was closed in 2004 and has not been reopened so far. By that time loss was incurred and default was committed in repayments and ultimately by Ext. PI dated 03-12-2005 that the petitioner had applied for settling the liability under OTS Scheme. When Ext. P14 provides for extension of the benefit of Ext. P13 OTS Scheme in a case where the promoter is unable to run the unit, the inability of the promoter has to be appreciated in a pragmatic sense. Otherwise, to deny the benefit there must be material to conclude that the factory has been closed for malafide reasons. There is no material in this case leading to such an inference. On the material produced, I have no reason to think that an entrepreneur like the petitioner would have left the unit closed since 2004 without any reason.

16. The 1st respondent on the other hand disputes the claim of the petitioner of its inability to run the unit, mainly relying on the payments that the petitioner made pursuant to Exts. P7 and P9 interim orders, Exts. R1(a) to R1(c), the bio-date of the Directors of the Company, which also contains the details of the assets and liabilities of the persons concerned and Ext. R1(d) is the bio-date of the Managing Director of the Company containing his age, educational qualification, experience etc. On this basis, it is contended that the case of inability canvassed by the petitioner is incorrect. Although the learned Counsel for the petitioner argued that the Directors do not possess the assets indicated in the statement of assets and liabilities, in my view a pronouncement on this contention is unwarranted. What is contemplated in Clause 1(a) is the inability of the promoters to run the unit. In my view, this provision has to be viewed in a commercial and pragmatic sense, and the inability to run the unit is the commercial inability which can be spelt out when the unit itself is making losses leading to its closure. Otherwise there must be material to conclude that the loss and closure is deliberate and manipulated, which is absent in this case. Further to say that payments made following Exts. P7 and P9 show the affluence of the promoters, to say the least, is perverse, in as much those payments were made under compelling circumstances and on the specific directions that it will be adjusted towards OTS liability. In my view, Clause 1 (a) is attracted in this case

and therefore, the argument of the Corporation that the petitioner is not eligible for the benefit of Clause 1(a) of Ext. P14 is totally incorrect.

17. Shri Sreekumar, the learned Counsel for the respondent Corporation relied on the judgments referred to above. In so far as the judgments in U.P. Financial Corporation Vs. Gem Cap (India) Pvt. Ltd. and Others, and Haryana Financial Corporation and Another Vs. Jagdamba Oil Mills and Another, are concerned, these are cases where in exercise of powers under Article 226 of the Constitution of India, the respective High Courts interfered with the proceedings initiated by the State Financial Corporations concerned, invoking their right u/s 29 of the State Financial Corporations Act. In the facts of these cases, dealing with the law that is applicable the Apex Court held that the steps taken by the Corporation for realizing its dues, should not have been interfered with. In my view, the law laid down in these two judgments can be of no application to the facts of this case for the reason, that in this case, admittedly, the Corporation had floated the OTS scheme, the benefit of which alone is claimed by the petitioners. If the rejection of the application made by the petitioner was on erroneous grounds, this Court is perfectly justified in interfering with such illegal rejection, and directing that the benefit of the Scheme should be extended to the petitioner, if they otherwise deserve the same. The next is the decision of the Allahabad High Court in Mahesh Chand Agarwal and Smt. Kanak Agarwal Vs. Union of India (UOI), Bank of India, Agra Branch (7250), The Collector and Tahsildar, . That again was a case, where the High Court held that in the absence of an OTS scheme, the Court cannot compel the Financial Corporation to settle the liabilities, otherwise than in terms of the agreement between the parties. Here again unlike the case dealt with by the Allahabad High Court, what the petitioner herein claims is the benefits of the OTS scheme floated and implemented by the respondent Corporation. Therefore, the three judgments relied on by the learned Counsel for the respondent Corporation are totally irrelevant in so far as this case is concerned. In this context, I should also make reference to Exts. P16 and P17 proceedings of the respondent Corporation itself, produced by the petitioner, where about 200 similar defaulters have been given the benefit of OTS scheme and the petitioner has in specific terms contended that they have been discriminated. In the counter affidavit filed, this contention of the petitioner is sought to be brushed aside by making a general and vague statement that each case is to be dealt with on its own merit. It may be true that there is an element of discretion conferred on the respondents. But, it being an instrumentality of state, cannot exercise the discretionary power discriminatively or capriciously, I am also not impressed with the argument that none can claim the benefit of the scheme as a matter of right. Therefore, on the facts of this case, I am satisfied that the petitioner is entitled to the benefit of Ext. P13, giving the benefit of Clause 1(a) of Ext. P14, and by rejecting the claim of the petitioner as per Ext. P19, the Corporation acted arbitrarily.

18. Ordinarily, in a case of this nature, if Ext. P19 is held erroneous, the course to be adopted is to set aside the same and to direct the respondents to

reconsider the matter in accordance with the scheme floated by it. But, in this case, as already noticed, this is the 3rd round of litigation and on a reading of Ext. P19, I am satisfied that injustice has been done to the petitioner on unreasonable grounds. Therefore, I do not think it proper to remit the matter for reconsideration. For these reasons, I direct the respondent Corporation to extend the benefit of Ext. P13 OTS Scheme, treating the petitioner's case as one coming under Clause 1(a) of Ext. P14 Orders shall be passed on Ext. P8 application made by the petitioner in the light of the above, as expeditiously as possible, at any rate, within four weeks of production of a copy of this judgment.

19. Needless to say that Rs. 40 lakhs paid by the petitioner in pursuance to Ext. P7 Rs. 60 lakhs paid by the petitioner in pursuance to Ext. P9 and Rs. 3.4 lakhs paid by the petitioner on the disposal of the industrial shed, will be given credit to the amount found to be due from the petitioner towards the liability under the OTS scheme.

20. It is directed that both the parties shall maintain status quo in regard to the assets of the Company until a decision is taken as ordered above.

The writ petition is disposed of as above.