
(2016) 01 P&H CK 0443
In the Punjab And Haryana At Chandigarh
Case No : CWP No. 24317 of 2013

Vivek Dureja

APPELLANT

Vs

The Punjab State Transmission Corporation Ltd. and Others

RESPONDENT

Date of Decision : 28-01-2016

Acts Referred:

Constitution of India, 1950 — Article 226
Contract Act, 1872 — Section 74
Securitisation and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (SARFAESI) — Section 13(4)

Citation : (2016) 2 PLR 429 : (2016) 2 RSJ 448 : (2016) 1 SCT 733 : (2016) 6 SLR 753

Hon'ble Judges : Gurmeet Singh Sandhawalia, J.

Bench : Single Bench

Advocate : Vijay Rana, Advocate, D.S. Patwalia, Sr. Advocate, B.S. Patwalia, Kannan Malik, Alka Chatrath, Bir Davinder Singh, K.S. Chahal, P.K.S. Phoolka, Achin Gupta and Manoj Kumar Sood, Advocates, for the Appellant; Vikas Chatrath, Parveen Kumar and Geeta Sharma,

Final Decision : Dismissed

Judgement

Gurmeet Singh Sandhawalia, J.—1. The present judgment shall dispose of 28 writ petitions i.e. CWP Nos. 15117, 16511, 24306, 24317, 24645, 24683, 26552, 27656, 28465 of 2013, 863, 3576, 7047, 11548, 12024, 12199, 13977, 14713, 14809, 14950, 18814, 19528, 19539, 22716 of 2014 and 2118, 2557, 2576, 4344, and 6963 of 2015 as common questions of facts and law are involved in all the writ petitions. The challenge primarily in the present bunch of cases is pertaining to the surety bond, which has been executed between the employees and the respondent-Corporation. For convenience, facts of CWP No. 24317 of 2013, Vivek Dureja vs. Punjab State Transmission Corporation Ltd. and others are being noticed, in which, challenge has been raised to the letter dated 15.10.2013 (Annexure P-7/T) issued by respondent no. 4 whereby, the petitioner has been asked to deposit a sum of Rs. 2,04,822/-.

2. It is not disputed that the amount is being claimed on the basis of a surety bond dated 18.07.2012 (Annexure P-2) which had been executed inter se the parties. The petitioner was appointed as a Junior Engineer (Civil) vide appointment letter dated 11.07.2012 (Annexure P-1) in the pay band of Rs. 10,900-34,800 + 4,350 grade pay. As per the terms of the appointment letter, there was to be a training period under Clause 3 as given by the Corporation and as per Clause 4, there was a probation period of two years which could be extended upto 4 years. Service could be dispensed with by giving 3 months" notice and payment of 3 months" salary on the part of the employee and allowances or by making the payment of that very period whichever is less than 3 months notice. As per clause 5, a surety bond had to be executed whereby, the employee was required to serve the Corporation for a minimum period of two years. In case of not doing so, he was to return the expenses including salary and allowances which were incurred by the Corporation upon his training from the date of demand. The minimum 3 months" salary alongwith allowances and rate of interest as prevailing at that point of time was also to be returned. Clause 5 reads as under:-

"5. Surety bond

You have to execute an agreement in an proper manner on the stamp papers at your own expenses that after completion of the training period you have to serve the Punjab State Transmission Corporation Limited for a minimum period of two years. In case of not doing so, then in such circumstances you have to return all the expenses including [Salary and allowances] which will be done by the Punjab State Transmission Corporation Limited upon your training from the date of demand raised by the Punjab State Transmission Corporation Limited and minimum three month"s salary along with allowances and rate of interest as prevailing at that time will be returned to you. The copy of the agreement is attached herewith. This agreement should be filled in a proper manner on the stamp paper of Rs. 100/- and alongwith you it should be signed by the two sureties. Out of these two sureties one surety should be an Officer of the Punjab State Transmission Corporation Limited/Punjab State Power Corporation Ltd. This agreement should be attested by the Executive Magistrate."

3. It is not disputed that in pursuance of the above said clause, a bond was also executed by the petitioner alongwith two other sureties namely Gurdeep Singh and Harmandeep Singh on 18.07.2012 as per the terms of the appointment letter pertaining to the training and the period of minimum service with the Corporation. The following conditions were made part of the surety bond:-

"Whereas the above bounded principle party has been appointed as Junior Engineer/Civil by the PSTCL and the PSTCL has agreed to give him technical training on its work for a period of one year or such period as may be decided by the PSTCL.

Now the condition of the above written obligation is that in the event of the

above bounded principle party Sh. Vivek Dureja failing to continue his duty during the period of training of within a period of two years after resuming his duties as Junior Engineer/Civil without any prior permission in writing of the PSTCL. The Principle party and sureties shall forthwith refund to the PSTCL as may be directed by the PSTCL on demand all money paid to the Principle Party or expended on a/c of the Principle party in respect of his entire salary and allowances during the period of his training and hereafter during the course of his employment under the PSTCL subject to minimum of three months pay and allowances together with interest thereon from the date of demand at the rate prevalent at that time (and as to the amount so to be refunded, the decision of the PSTCL shall be final)."

4. After a period of 8 months from executing of the bond, the petitioner wanted to resign from the employment contract which he had executed on account of some personal reasons and, therefore, served a notice dated 15.03.2013 (Annexure P-3) that he wishes to resign and the same may be considered as notice period of 3 months for accepting of his resignation. Thereafter, he relinquished the charge on 22.04.2013 and opted to deposit a sum of Rs. 65,570/-, which was the required amount of two months salary in lieu of the remaining notice period.

5. The Corporation on 14.08.2013 (Annexure P-5) claimed the whole salary in lieu of the whole service rendered alongwith interest @ 12.5% per annum and accordingly, claimed a sum of Rs. 1,96,105/- and an interest element of Rs. 8,717/-. Accordingly, a demand of Rs. 2,04,822/- was claimed from the petitioner so that the no due certificate could be issued to him and the approval of the resignation could be got. It was further mentioned that in case the amount is not deposited as per the terms and conditions on the surety bonds, the amount would be recovered from the sureties and the petitioner would be responsible for the same.

6. The petitioner objected to the same by submitting his reply by placing reliance upon pendency of CWP No. 15117 of 2013, Mandeep Singh vs. The Punjab State Transmission Corporation Ltd. and others, which is part of the present bunch of cases. Thereafter, impugned letter was issued on 15.10.2013 whereby, the demand was again raised that the amount was liable to be recovered. Resultantly, the present writ petition was filed.

7. In the written statement filed by the Corporation, it was alleged that neither the plea had been taken that there was any fraud or coercion and the contract had been entered into with open eyes. Justification was given that expenses had been incurred on the recruitment process and a large number of applicants had applied. The amount was worked out that while calculating and formulating the bond and a sum of Rs. 1,09,92,240/- was the cost estimate prepared by the agency of the recruitment process. It has been pleaded that as per the bond, minimum service of two years has to be there with the Board and the contract was sought to be annulled. Challenge had not been laid to the validity of the

contract of agreement and, therefore, in the absence of any such challenge, no relief could be granted. It was also specifically mentioned that this Court was not the appropriate Forum for redressal of the grievance specially when the fundamental rights were not breached. Disputed questions of facts were arising which could not be adjudicated in a writ petition and if any remedy was there, it was by way of leading evidence etc. The amount deposited vide the draft was not in accordance with the agreement entered into with the Corporation and, therefore, the other dues had to be paid and the Corporation was well within its right to claim the amount. The petitioner was bound to pay back the amount as he has merely deposited the 3 months' salary but not the balance amount. In CWP Nos. 14713 and 14809 of 2014, the petitioners have deposited the amount, as claimed by the Corporation and in some cases they have deposited the amount during the pendency of the writ petition and are accordingly seeking refund.

8. Counsel for the petitioner has placed heavy reliance upon a Division Bench judgment of this Court in *Dr. Nitin Gupta vs. Post Graduate Institute of Medical Education and Research*, 2007 (2) SCT 434 decided on 07.07.2006 and judgment of the Apex Court in *Central Inland Water Transport Corporation Ltd. and another vs. Brojo Nath Ganguly and another*, , AIR 1986 Supreme Court 1571.

9. Counsel for the respondents relied upon the Apex Court judgment in *Sant Longowal Institute of Engineering and Technology and another vs. Suresh Chandra Verma*, , 2014 (1) RSJ 63, wherein, the Apex Court has allowed the appeal setting aside the demand notice issued by the educational institute whereby, refund was sought for the period of study for pursuing the Ph.D. as per the terms and conditions of the bond. It was held that there was a provision that if the government servant resigns or retires without returning from a period of study leave and is unable to furnish the certificates as required, he was liable to refund the actual amount of study leave etc. Therefore, in principle, prima facie the right to recover in view of the bond, in the opinion of this Court, as such cannot be totally said to be without any basis which is executed inter se the parties.

10. The intermingled issue which arises is that whether any order has been passed by the Corporation which would entitle the petitioner to a cause of action. The Corporation is to recover the amount in accordance with law which is by filing a civil suit in order to encash the bond or surety which has been given and the undertaking which has been given.

11. For this, the Corporation will necessarily have to resort to its remedy in accordance with law. In such circumstances, it is always open to the employees/ex-employees to defend the action of the Corporation by taking the pleas which they are now seeking to raise. It is settled principle that where there is an alternative and efficacious remedy provided, this Court will again not, at the first instance, also adjudicate upon the issue.

12. It is apparent that as per Section 74 of the Indian Contract Act, 1872, where any party quantifies a damage or penalty for the breach of the contract, the Court would have to see whether such compensation is reasonable regarding the facts and circumstances of the case. Section 74 of the Contract Act reads thus:-

"74. Compensation of breach of contract where penalty stipulated for.- When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss or proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

13. The said provisions came up for consideration before the Apex Court in *Fateh Chand vs. Balkishan Das*, (1964) 1 SCR 515. It is accordingly held as under:-

"Section 74 of the Indian Contract Act deals with the measure of damages in two classes of cases (i) where the contract names a sum to be paid in case of breach, and (ii) where the contract contains any other stipulation by way of penalty.... The measure of damages in the case of breach of a stipulation by way of penalty is by Section 74 reasonable compensation not exceeding the penalty stipulated for."

The Court also observed:

"It was urged that the section deals in terms with the right to receive from the party who has broken the contract reasonable compensation and not the right to forfeit what has already been received by the party aggrieved. There is however no warrant for the assumption made by some of the High Courts in India, that Section 74 applies only to cases where the aggrieved party is seeking to receive some amount on breach of contract and not to cases whereupon breach of contract an amount received under the contract is sought to be forfeited. In our judgment the expression "the contract contains any other stipulation by way of penalty" comprehensively applies to every covenant involving a penalty whether it is for payment on breach of contract of money or delivery of property in future, or for forfeiture of right to money or other property already delivered. Duty not to enforce the penalty clause but only to award reasonable compensation is statutorily imposed upon courts by Section 74. In all cases, therefore, where there is a stipulation in the nature of penalty for forfeiture of an amount deposited pursuant to the terms of contract which expressly provides for forfeiture, the court has jurisdiction to award such sum only as it considers reasonable but not exceeding the amount specified in the contract as liable to forfeiture.", and that,

"There is no ground for holding that the expression "contract contains any other stipulation by way of penalty" is limited to cases of stipulation in the nature of an agreement to pay money or deliver property on breach and does not comprehend covenants under which amounts paid or property delivered under

the contract, which by the terms of the contract expressly or by clear implication are liable to be forfeited."

14. Similarly, the issue again came up in *Maula Bux vs. Union of India*, , AIR 1970 SC 1955. The relevant observations read thus:-

".....in every case of breach of contract the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree and the Court is competent to award reasonable compensation in case of breach even if no actual damage is proved to have been suffered in consequence of the breach of contract. But the expression "whether or not actual damage or loss is proved to have been caused thereby" is intended to cover different classes of contracts which come before the Courts. In case of breach of some contracts it may be impossible for the Court to assess compensation arising from breach, while in other cases compensation can be calculated in accordance with established rules. Where the Court is unable to assess the compensation, the sum named by the parties if it be regarded as a genuine pre-estimate may be taken into consideration as the measure of reasonable compensation, but not if the sum named is in the nature of a penalty. Where loss in terms of money can be determined, the party claiming compensation must prove the loss suffered by him."

15. The view was followed in *Union of India vs. Rampur Distillery and Chemical Company Ltd.* , AIR 1973 SC 1098.

16. This Court in *Post Graduate Institute of Medical Education and Research, Chandigarh vs. Dr. J.S. Gupta and others*, , 1984 (1) ILR (Punjab) 357 had an occasion to consider the similar issue where the employer was seeking to recover a sum of Rs. 45,000/- mentioned in the bond which was given for ensuring that the person would serve for 4 years after the expiry of the leave. The suit of the employer-PGI was dismissed by holding that there was no loss caused to the plaintiff and the plaintiff was not entitled to recover the amount. This Court came to the conclusion that the real damages not exceeding the penal amount can be recovered and if the amount has been fixed, the same can also be recovered. It was accordingly held that the question is to be determined in each case after taking into consideration the facts of that case. The relevant portion reads thus:-

"10. From a reading of the Section and the observations of the Supreme Court, it emerges that if parties to a contract named a penal amount as becoming due on breach of the contract, the real damages not exceeding the penal amount can be recovered. On the other hand, if the amount has been determined by them as fixed measure of damages to avoid any future difficulty to ascertain it, the amount so named can be recovered. The use of the word penalty or liquidated damages in the contract is not decisive factor to reach the conclusion that the amount claimed is penalty or liquidated damages. Such a question has to be determined in each case after taking into consideration the facts of that case. It is generally seen that in some cases of contracts it is not possible for the Court to

estimate damages whereas there are some in which damages can be calculated in accordance with well-known principles. In the former cases, the sum named by the parties, if it represents the genuine pre- estimate of damages, may be considered as a reasonable compensation, while in the latter cases, the loss suffered is required to be proved.

11. xxx xxx xxx

12. It has already been observed that in case the damages cannot be estimated, the amount named in the agreement as damages can be recovered if these are genuine and pre-estimated. The association of Dr. Gupta with the Institute was a great asset and after he left it no amount of compensation could make up the loss. The amount mentioned in the bond also does not appear to be excessive and unconscionable. Therefore, I am of the view that the amount of Rs. 45,000/- cannot be held to be not genuine and pre-estimated damages."

17. Thus, in the opinion of this Court, these are disputed questions of fact and cannot be adjudicated in a writ Court in the absence of any evidence. The parties would have to necessarily specifically plead and prove so and it is on that basis the civil court can come to the conclusion. It is settled principle that where disputed questions of facts arise, the writ Court is not to exercise its jurisdiction.

18. The question which would, thus, arise for consideration before the civil court is that whether the bonds were executed by way of fraud on the strength of any coercion or willingly and whether the petitioners have undergone any training, on the basis of which, the Corporation seeks to recover the amount.

19. The Apex Court in *City and Industrial Development Corporation vs. Dosu Aardeshir Bhiwandiwalla and others*, , (2009) 1 SCC 168 laid down the principles whereby, this Court would exercise its remedy under Article 226 of the Constitution of India. It was specifically held that this Court had to consider whether the petitioner has an alternative and efficacious remedy for the resolution of the dispute. Paragraphs 29 and 30 of the judgment reads as under:-

"29. In our opinion, the High Court while exercising its extraordinary jurisdiction under Article 226 of the Constitution is duty-bound to take all the relevant facts and circumstances into consideration and decide for itself even in the absence of proper affidavits from the State and its instrumentalities as to whether any case at all is made out requiring its interference on the basis of the material made available on record. There is nothing like issuing an ex parte writ of mandamus, order or direction in a public law remedy. Further, while considering the validity of impugned action or inaction the Court will not consider itself restricted to the pleadings of the State but would be free to satisfy itself whether any case as such is made out by a person invoking its extraordinary jurisdiction under Article 226 of the Constitution.

30. The Court while exercising its jurisdiction under Article 226 is duty-bound to consider whether:

- (a) adjudication of writ petition involves any complex and disputed questions of facts and whether they can be satisfactorily resolved;
- (b) the petition reveals all material facts;
- (c) the petitioner has any alternative or effective remedy for the resolution of the dispute;
- (d) person invoking the jurisdiction is guilty of unexplained delay and laches;
- (e) ex facie barred by any laws of limitation;
- (f) grant of relief is against public policy or barred by any valid law; and host of other factors. The Court in appropriate cases in its discretion may direct the State or its instrumentalities as the case may be to file proper affidavits placing all the relevant facts truly and accurately for the consideration of the Court and particularly in cases where public revenue and public interest are involved. Such directions are always required to be complied with by the State. No relief could be granted in a public law remedy as a matter of course only on the ground that the State did not file its counter affidavit opposing the writ petition. Further, empty and self defeating affidavits or statements of Government spokesmen by themselves do not form basis to grant any relief to a person in a public law remedy to which he is not otherwise entitled to in law."

20. In *United Bank of India vs. Satyawati Tondon and others*, , 2010 (8) SCC 110, while examining the issue of the challenge being raised to the recovery proceedings under the Recovery of Debts due to Banks and Financial Institutions Act, 1993. The order of the High Court restraining the bank from taking action in furtherance of the notice issued under Section 13(4) of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 and the right of the surety to pay the decretal amount was also answered and the alternative remedy available under the Act was held to be an effective remedy available to the aggrieved person. The power exercised under Article 226 of the Constitution of India was accordingly held not to have been validly exercised and the appeal was accordingly allowed.

21. Resultantly, this Court is of the opinion that where the petitioners have deposited the amount, it is always open to them to seek the refund by filing appropriate proceedings by pleading that the amount was in violation of the bond and against its terms and conditions. The amount recovered/or claimed was excess and that the bond was executed under duress. Similarly, it is always open for the Corporation to recover the said amount by taking its recourse to appropriate remedies for which the petitioners can always defend by taking pleas which they are now seeking to raise. The Corporation also cannot in an arbitrary manner, hold back the NOCs and not permit the employees to carry on further with their careers on the ground that they are to recover the amount.

22. Accordingly, keeping the issue open and not commenting upon the merits of the case let it may prejudice any side, the writ petitions are disposed of with the

above noticed observations that it is open for the parties to approach the Civil Courts for their remedies. Disputed questions of fact in each and every case would arise as to whether somebody was given the training and for what period and whether the probation period can be considered as such. Whether the Corporation is entitled for what amount due as per the terms and conditions of the bond. Similarly, it would be also a question of fact in each case as to whether the bond was on the basis of any threat or coercion and it was unjust or had been acted upon willingly.

23. In each and every case, the service of the employee would be different and the amount which the Board would be entitled to would also accordingly vary and the right to claim the amount under Section 74 would thus be as per the facts of each case.

24. In CWP No. 16511 of 2013, which is part of the present bunch of cases, an interim order was passed on 22.10.2013, which reads thus:-

"In the meantime, the Punjab State Transmission Corporation Ltd. is directed to relieve the petitioner immediately without insisting on the formalities of release of bond and the petitioner thereafter would be permitted to join the new assignment with the Punjab State Power Corporation Ltd."

25. The said interim order was challenged before the Division Bench by the respondent-Corporation and the order was modified on 03.12.2013 by directing that an indemnity bond would be furnished by the employees in favour of the Corporation to the effect that in case the writ petition is dismissed, they will comply with the terms and conditions of bond. The relevant part reads thus:-

"Having heard learned counsel for the parties, we are of the considered view that the learned Single Judge has never intended to cause any prejudice to the appellants' right/claim which is yet to be adjudicated on merits. Consequently, we modify the order dated 22.10.2013 to the extent that the first respondent shall furnish an indemnity bond in favour of the appellant- Corporation to the effect that in case his writ petition is dismissed, he shall comply with the terms and conditions of the Bond."

26. Accordingly, as per the order of the Division Bench dated 03.12.2013 whereby, the petitioners have submitted the indemnity bond the same shall be valid during the pendency of the proceedings, if initiated by the Corporation. In cases where the NOC has not been issued, the Corporation shall issue necessary NOCs on the furnishing of the indemnity bonds.