
(1998) 02 P&H CK 0127
In the Punjab And Haryana At Chandigarh
Case No : Civil Writ Petition No. 5201 of 1997

Vivek Sarin and Others

APPELLANT

Vs

State of Haryana and Others

RESPONDENT

Date of Decision : 24-02-1998

Acts Referred:

Constitution of India, 1950 — Article 246, 254
Haryana Public Moneys (Recovery of Dues) Act, 1979 — Section 1, 2
State Financial Corporations Act, 1951 — Section 1

Citation : AIR 1998 P&H 160 : (1998) 119 PLR 226 : (1998) 2 RCR(Civil) 179

Hon'ble Judges : R.L. Anand, J;Jawahar Lal Gupta, J

Bench : Division Bench

Advocate : U.S. Sahni, for the Appellant; Madan Dev, for A.G. and Kamal Sehgal, for the Respondent

Final Decision : Dismissed

Judgement

Jawahar Lal Gupta, J.—The petitioners pray that the Haryana Public Moneys (Recovery of Dues) Act, 1979 be declared ultra vires the Constitution and that the demand notice dated February 26, 1997 by which the Haryana Financial Corporation has called upon the petitioners to buy back the two hundred thousand equity shares, be quashed. A few facts as relevant for the decision of this case may be briefly noticed.

2. M/s. Apex Multitech Limited is a Public Limited Company. Petitioner No. 1 is the Managing Director while petitioner Nos. 2 and 3 are its Directors. The Company has two Units in the Industrial area, Phase-11, Panchkula. The Company and the Haryana Financial Corporation had entered into certain financial transactions. For the decision of the controversy involved in the present case, it would suffice to notice that on August 13, 1996, the Haryana Financial Corporation issued a recall notice to the Company for an amount of Rs. 2,18,44,424/- with interest, A copy of this notice has been produced as Annexure P.11 with this writ petition. The company was called upon to immediately pay the

amount failing which it was said that the unit will be taken over for recovery of dues under the State Financial Corporations Act, 1951 and the Haryana Public Moneys (Recovery of Dues) Act, 1979. The company submitted a reply. On August 30, 1996, the Corporation informed the company that it was no longer possible for it to wait for the payment of the amount. Consequently, action was taken u/s 29 of the 1951 Act. The Company was called upon to hand over possession on September 6, 1996. A copy of the letter dated August 30, 1996 has been produced as Annexure P. 13 with the writ petition. It is alleged that on receipt of this order, "the petitioner challenged..... action of the respondent-Corporation through a writ petition in this Hon"ble Court under C.W.P. No. 13673 of 1996." Vide order dated October 18, 1996, the writ petition was admitted. The respondent-Corporation was, however, restrained from selling or auctioning the Unit. This writ petition is " still pending.

3. On February 26, 1997, the respondent-Corporation addressed a communication to petitioner No. 1 calling upon him "to Buy Back 2,00,000 Equity Shares of Rs. 10/- each at par aggregating to Rs. 20.00 lacs at a minimum return of 18% p.a. compounded at quarterly rests from the date of subscription to the actual date of buy back." The petitioner was informed that in case the needful was not done within 15 days, the Corporation shall proceed to recover the dues under the 1979 Act. A copy of this communication is at Annexure P. 14. The petitioner submitted a reply dated March 10, 1997. Having failed to get any response, all the three petitioners have filed the present writ petition. It is alleged that the provisions of the 1979 Act arc ultra vires the Constitution. The notice for the buying back of the shares is illegal.

4. A written statement has been filed on behalf of respondent No. 2 viz. the Haryana Financial Corporation. It has been averred by way of a preliminary objection that the petitioners have not brought the true facts to the notice of the Court. The Company had availed various facilities from the Corporation like Term Loan, Working Capital Loan, Equity Investment in Boughtout Deal, Lease Finance Assistance etc. At the time of take over of the Unit, it was found that "the funds advanced under Boughtout Deal and Leased Finance Assistance have been misutilised as the assets are not created/available at site." Four legal documents had been executed with the promoters/company. One of these was the Boughtout Deal Agreement which had been executed on December 21, 1994. The buy back of the shares subscribed by the Corporation "together with interest is guaranteed by the Company and its promoters/directors if and when the Corporation decides to offload the shares to the company.. .. ."The Managing Director of the Company had also executed and signed a "Promissory Note on behalf of the captioned company in respect of receipt of Rs. 20.00 lacs as equity participation of the Corporation in the Boughtout deal of Rs. 80.00 lacs." Still further, a "Bond of Guarantee was executed by promoters/guarantors in their personal capacity namely S/Shri D.C. Puri, R.P. Sareen, Vivek Sareen and Anil Sareen, which is supplemental) to the Boughtout deal agreement executed between the captioned company and the Corporation to secure the investment of

Rs. 20.00 lacs with interest." Thus, the respondent maintains that the "promoters of the company have guaranteed the performance of each clause of the Boughtout deal agreement and, therefore, they are liable in personal capacity to make good the losses suffered by the Corporation under the BOD agreement." It has been averred that the petitioners were asked to buy back these shares. On their failure, the Corporation is entitled to recover the money as arrears of land revenue. It has been further stated that the Corporation is enforcing a contractual obligation and that the writ petition is not competent. Furthermore, details regarding various other transactions have also been given. However, it is not necessary to refer thereto in view of the fact that the present case is confined to the validity of the notice at Annexure P. 14 and the provisions of the Act. The claim that the Act is ultra vires the Constitution has been denied.

5. The petitioners have filed a replication. In reply to the preliminary objection, it has been averred that the respondent has "sought to confuse the real issue. . . ." Various averments as made in the written statement have also been controverted while those in the writ petition have been reiterated.

6. Learned counsel for the parties have been heard.

7. Mr. U.S. Sahni, counsel for the petitioners contended that on admitted facts, they did not fall within the definition of a "defaulter" as contained in Section 2(c) of the 1979 Act. Consequently, the Corporation is not entitled to resort to the provisions of the Haryana Public Moneys (Recovery of Dues) Act, 1979. It was further contended that the respondent-Corporation should recover the amount from the property pledged by the Company viz. the factory, buildings along with machinery and fixtures etc. Lastly, it was contended that the provisions of the 1979 Act were wholly ultra vires as the State Legislature could not have enacted the impugned Act. In any case, the provisions of the 1979 Act were repugnant to those of the 1951 Act and since the requirement of Article 254 had not been complied with, the Act was void.

The claim made on behalf of the petitioners was controverted by Mr. Kamal Sehgal who appeared for the respondent-Corporation. He contended that the petitioners are under a contractual obligation to buy back the shares. The Corporation is entitled to enforce this obligation. The Act is within the competence of the State Legislature. The provisions of the 1979 Act are not ultra vires. Since the shares had been offered to the petitioners and they had not carried out their obligation, they were defaulters and action in accordance with the provisions of the 1979 Act was rightly initiated.

8. The questions that arise for consideration are :--

(i) Are the petitioners liable to buy back the shares?

(ii) Do the petitioners fall within the definition of a "defaulter" as contained in Section 2(c)?

(iii) Are the provisions of the 1979 Act ultra vires or otherwise void?

Regulation : (i)

9. An extract from the Boughtout Deal Agreement has been produced by the petitioners as Annexure P. 16 with the writ petition. Clause 14 of this agreement contains the buy back option. It is in the following terms :--

"14. BUY BACK OPTION :

(i) Buy back of equity shares subscribed by the Corporation together with interest @ at least 18% p.a. compounded at quarterly rests, is hereby guaranteed by the Company and its promoter directors if and when the Corporation decides to offload the share to the company."

10. A perusal of the above shows that the Company and its promoter/directors have undertaken to buy back the equity shares subscribed by the Corporation. They are also liable to pay interest @ at least 18% per annum compounded at quarterly rests. The Corporation can decide to offload the shares at any time. The petitioners are under a clear obligation to buy back the shares and to pay the amount in accordance with the above noted stipulation.

11. In the replication, the petitioners have inter alia pleaded that they were not required to buy back the shares as according to "Clause 14(ii) of the agreement, the respondent-Corporation was required first to offer the shares for buy back to the Company and in case, the Company does not accept the buy back of the shares when offered, the Corporation was free to dispose them off in the open market." Clauses (ii) and (iii) of the agreement have also been quoted by the petitioners. These are in the following terms:--

"(ii) The Corporation agrees that as and when it decides to offload the shares held by it, the same shall first be offered for buy back to the company at a price related to the quoted average price, as may be decided by the Corporation or the amount determined as at 14(i) above, whichever is higher.

(iii) In case, the Company does not accept to buy back the shares when offered by the Corporation and the Corporation so decides, it shall be free to dispose them of in the open market in the manner considered fit and the Company shall have no right to interfere or challenge such an action of the Corporation."

12. On the basis of the above provisions, it has been pleaded that when the Company does not accept the shares, the Corporation is free to sell in the open market. The suggestion was that the petitioners were under no obligation to pay for the shares. Is it so?

13. As already noticed, the promoter-Directors have undertaken to buy back the shares with a minimum interest of 18% per annum compounded at quarterly rests. Sub-clause (ii) requires the Corporation to offer the shares to the Company, at the price which is "quoted" or as determined under Sub-clause (i), whichever is higher. Thus, even if a share of Rs. 10/- is being quoted as Rs. 5/-, the Corporation shall be entitled to insist upon the price as determined under

Sub-clause (i). Sub-clause (iii) gives an option to the Corporation only to dispose of the shares in the open market. It, however, does not imply that the petitioners are absolved of their obligation under Sub-clause (i).

14. In view of the above, it is held that the petitioners who are admittedly promoter-Directors of the Company are liable to buy back the shares at the price determined under Clause 14(i).

15. Accordingly, the first question is answered against the petitioners.

Regulation : (ii)

16. Admittedly, the petitioners were called upon to buy back the shares within 15 days. They did not. The Corporation chose to proceed under the 1979 Act. The petitioners claim that they do not fall within the definition of a "defaulter." Is it so?

Section 2 (c) defines a "defaulter" as follows :--

" "Defaulter" means a person who, either as principal or as surety, is a party-

(i) to any agreement relating to a loan, advance or grant given under that agreement or relating to credit in respect of, or relating to hire purchase of goods sold by the State Government or the Corporation, by way of financial assistance; or

(ii) to any agreement relating to a loan, advance or grant given under that agreement or relating to credit in respect of, or relating to hire purchase of, goods sold by a Government company under the State-sponsored scheme; or

(iii) to any agreement relating to a guarantee given by the State Government or a Corporation in respect of a loan raised by an industrial concern; or

(iv) to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue; and such person makes any default in repayment of the loan or advance or any instalment thereof, or having become liable under the conditions of the grant to refund the grant or any portion thereof, makes any default in the refund of such grant or portion or any instalment thereof or otherwise fails to comply with the terms of the agreement."

17. In a nut shell, a person who is a party to an agreement relating to a loan, advance or grant etc. and makes a default in repayment or refund or otherwise "fails to comply with the terms of the agreement" falls within the mischief of the provision.

18. What is the position in the present case? The petitioners have admittedly entered into an agreement with the respondent-Corporation. According to this agreement, the Company had approached the Corporation for "equity participation of Rs. 20 lacs....." The Corporation had agreed to "provide an amount of Rs. 20 lacs. . . . as its part of equity participation in the. Bought

Out Deal for buying a total of Rs. 2.00,000 equity shares of Rs. 10/- per share at par." It was further provided that the amount shall be used solely for the project. As already noticed, even a buy back option was given in Clause 14.

On a perusal of the agreement, it is clear that it was in the nature of a loan, advance and even a grant. In any event, the petitioners had got an amount of Rs. 20 lacs in pursuance of the agreement. Certain conditions had been laid down. Under the terms of the agreement, the promoters/ directors were liable to buy back the equity shares and pay the amount along with interest at the specified rate. This agreement had all the ingredients of an advance. The petitioners had got a "financial assistance" to the extent of Rs. 20 lacs. They had been executed a promissory note on December 21, 1994 as well as a Bond of Guarantee on the same day. They had got credit of Rs. 20 lacs. They were under an obligation to pay the money to the Corporation in conformity with the provisions of Clause 14. They were called upon to do so. Having failed to comply with the terms of the agreement, they clearly fell within the definition of a "defaulter." Thus, the provisions of the Act were fully applicable.

19. Even the second question is, accordingly, answered against the petitioners.

Regulation: (iii)

20. Mr. Sahni contended that Parliament had the exclusive jurisdiction to enact laws in respect of Financial Corporations by virtue of an Entry 43 in List I. The Parliament had enacted the State Financial Corporators Act, 1951. The State Legislature had no jurisdiction to enact the 1979 Act. The Statute is, thus, ultra vires. Furthermore, the provisions of the State Act being repugnant to those of the Central Act and the State Legislation having not been reserved for the consideration of the President, cannot prevail in the territory of Haryana. On the other hand, Mr. Sehgal submitted that the State Act was clearly referable to Entry 43 of List II. II was supplemental to the provisions of the Central Statute. Learned counsel also referred to certain decisions in support of his claim.

21. Under Article 246, Parliament has exclusive power to make laws with regard to matters enumerated in List I. Similarly, the Legislature of a State has exclusive power to make laws in respect of the matters enumerated in List II. When a Statute is referable to an entry in List I or II, no question of ultra vires would arise.

22. In respect of the matters contained in List III, the Parliament as well as the State Legislatures have been empowered to make laws. It is only when the Parliament as well as the State Legislature enact a law on a matter included in the Concurrent List that the test of repugnancy as envisaged under Article 254(2) of the Constitution can be applicable. The test of pith and substance is applied to determine as to whether or not the State law has substantially encroached upon the field occupied by the law enacted by the Parliament. An incidental encroachment is normally overlooked. Furthermore, the entries in the Legislative lists are merely topics or fields of legislation. These have to be

liberally construed.

23. What is the position in the present case? The State Financial Corporation Act, 1951 is clearly referable to entry 43 in List I. So far as the State law is concerned, it was enacted "to provide for the speedy recovery of certain classes of dues." In the statement of objects and reasons, it was specifically mentioned that certain industrial concerns had been defaulting in the repayment of loans advanced by the Haryana State Financial Corporation. This has resulted in accumulation of heavy arrears. It was to ensure quick recoveries that the bill was presented.

24. This Act provides that where sum is recoverable from a defaulter by the State Government or by a Corporation, the named authority shall send "a certificate to the Collector mentioning the sum due from the defaulter and requesting that such sum together with the cost of proceedings be recovered as if it were an arrear of revenue." The jurisdiction of the Civil Court to adjudicate upon such a case has been excluded.

25. By virtue of entry 43, the State Legislature is competent to legislate in respect of "public debt of the State." The State law is calculated to ensure a quick recovery of the public dues. The impugned legislation squarely falls within entry 43. In fact, a similar legislation viz. the U.P. Public. Moneys (Recovery of Dues) Act has already been upheld by their Lordships of the Supreme Court; in the Director of Industries, U.P. and Others Vs. Deep Chand Agarwal, . It was emphasised by their Lordships that "moneys advanced by the State Government have got to be recovered expeditiously so that fresh advances may be made from the State Government. It is with the object of avoiding the usual delay involved in the disposal of suits in Civil Courts and providing for an expeditious remedy, the Act has been enacted." Section 3 which was almost in similar terms was upheld by their Lordships. Thus, the State Legislation was clearly within the competence of the Legislature, Consequently, it is not ultra vires.

26. Mr. Sahni contended that the provisions of the State Act were repugnant to those of the Central Act.

27. This contention is misconceived. The Central Legislation is referable to entry 43 in List I. The State legislation is referable to entry 43 in List II. Neither of the two Statutes relates to any matter in List III. Consequently, the question of repugnancy or application of the provisions of Article 254(2) of the Constitution does not arise. Still further, the State legislation is only calculated to supplement and advance the object of the 1951 Act. Equally, by virtue of Section 46-B of the 1951 Act, the provisions are "in addition to and not in derogation of any other law for the time being applicable to an industrial concern." Even provisions of Section 32-G specifically provide that the amount due to the Financial Corporation can be recovered as arrear of land revenue. A Full Bench of the Allahabad High Court had considered a similar issue in Krishna Utensils, Rampur Vs. State Financial Corporation and Others, . Their Lordships were pleased to

uphold the provisions of Section 3 and had negated the challenge to the Statute. The position in the present case is similar. We are in respectful agreement with the view expressed by their Lordships of the Allahabad High Court.

28. In our view, the provisions of the State Act are clearly referable to entry 43 in List II. Thus, it is not ultra vires. Furthermore, the Central and State Acts do not relate to any matter covered by List III. Thus, there is no repugnancy or violation of Article 254(2). The provisions of the State Act are in pith and substance supplemental to and not in derogation of the Central Act. There is no substantial encroachment.

29. Thus, even the third question is answered against the petitioners.

30. Mr. Sahni had also contended that the Corporation can recover the money by sale of buildings and machinery etc. pledged with it. The arrest of the promoters should be the last resort.

31. Apparently, the plea appears to be innocent. Learned counsel was asked if the petitioners were willing to file an affidavit that the respondent-Corporation may recover the money by sale of buildings and the machinery. He immediately asserted that the sale of the Unit had been stayed by the Division Bench in the writ petition filed by the Company viz. C.W.P. No. 13673 of 1996. That being so, the contention was only a device to avoid payment. However, it is clarified that in case, the petitioners so want, they may approach the respondent-Corporation with a request to recover the amount due to it by sale of building and machinery.

32. No other point was raised.

33. In view of the above, it is held that the provisions of the State Act are not ultra vires. These are not violative of Article 254(2) of the Constitution. The action of the respondent-Corporation in proceeding to recover the amount under the State Legislation is not illegal. Consequently, there is no merit in this writ petition. It is, accordingly, dismissed. There will, however, be no order as to costs.