

SUPREME COURT OF INDIA

Himachal Pradesh Financial Corporation

Vs.

Anil Garg

C.A.No.661 of 2008

(Ranjan Gogoi and Navin Sinha, JJ.,)

28.03.2017

JUDGMENT

Navin Sinha, J.,

1. The Appellant is aggrieved by order dated 4.10.2005 allowing the writ petition of the Respondent, setting aside the auction notice under Section 85 of the Himachal Pradesh Public Moneys (Recovery of Dues) Act, 1973 (hereinafter be referred to as "the Act") issued consequent to his failure to repay the two loans availed for purchase of a truck and establishing an industry for manufacture of steel trunks.
2. The Respondent has remained unrepresented despite valid service of notice.
3. Learned Senior Counsel Shri J.S. Attri, on behalf of the Appellant, submits that the High Court has erred by inferring abandonment of the claim by withdrawal of the Suit. The withdrawal was made to initiate fresh proceedings under the Act, as it provided for a more speedy and effective remedy, under a special law. The absence of any liberty in the withdrawal order is not relevant. There was no bar under the Act to the proceedings. The remedy under Section 3(1)(d) (iv) of the Act was independent and without prejudice to any other mode of recovery under any law for the time being in force, and which will include a Suit. The High Court had wrongly applied the principle of 'public policy' to restrain recovery of a public loan. The doctrine of election had no application in the facts of the case.
4. The High Court erred on facts in holding that the proceedings under the Act for recovery of the trunk loan was initiated only in the year 2003, and that nothing had been done by the Appellant from 1996 till 2002 thus making the claim time barred. The recovery certificate had been issued by the Collector as far as back 3.9.1994. It was stalled by the Respondent filing writ petitions before the High Court. The High Court had granted liberty to the Appellant for proceeding afresh in accordance with law.
5. We have considered the submissions, as also perused the materials on record.

6. The Respondent applied for a loan of Rs.1.90 lakhs in 1989 to purchase a Swaraz Mazda truck and executed a hypothecation deed. Repayment schedule commenced from 10.1.1990 culminating on 10.7.1994. Rs.10,000/- only was repaid on 6.3.1991. The vehicle was seized on 6.5.1991 under Section 29 of the State Finance Corporation Act, 1951 and auction sold on 4.9.1991 for a sum of Rs.1.46 lakhs. A Money Suit was filed before the Senior Sub Judge, Shimla for recovery of the balance of Rs.1,25,270/- along with future interest and costs. The Suit was withdrawn on 12.12.1995 under Order 23, Rule 1 of the Code of Civil Procedure stating that the Appellant desired to proceed under the Act. The Suit was dismissed as withdrawn. Recovery Certificate was then issued under the Act on 19.4.1996 for a sum of Rs.1,94,283/- followed by a warrant of arrest.

7. The Respondent thwarted the Certificate proceedings by filing a Suit before the Senior Sub Judge, Shimla contending that the fresh proceedings were barred due to withdrawal of the Suit without any liberty, and that the claim was time barred. An interim-order was obtained, but ultimately the Suit was dismissed for non-prosecution on 21.5.2001.

8. Another loan of Rs.30,000/- was availed by the Respondent on 15.12.1988 for a trunk industry and a hypothecation-deed executed in respect of property bearing Khata/Khatuni No.102/347, Khasra No.1014. The last installment of the loan was payable on 10.1.1996. The Respondent remitted Rs.4,000/- in May 1991 and Rs.1,000/- in November 1991. A request was made before the Collector for recovery certificate on 12.11.1992, and the Certificate was issued on 3.9.1994. The Respondent objected that no prior notice was given and that the proceedings were time barred.

9. The Respondent instituted C.W.P. No. 1102 of 2002 before the High Court questioning both the recovery proceedings. The writ petition was allowed on technical grounds with liberty to the Appellant for proceeding afresh in accordance with law. Fresh show cause notices were then issued in respect of the two loans on 26.11.2002 and 2.11.2002 respectively, followed by fresh recovery certificates on 10.3.2003 for recovery of Rs.5,50,165/- and Rs.61,503.92/- respectively.

10. The Respondent again filed C.W.P. No.136 of 2005 pursuant to which the impugned order came to be passed.

11. The High Court relying on *Sarguja Transport Service vs. State Transport Appellate Tribunal*, AIR 1987 SC 88, held that the Suit having been withdrawn unconditionally for inexplicable reasons, and without any liberty granted under Order 23 Rule 1 of the Code of Civil Procedure for initiating appropriate legal proceedings, it amounted to abandonment of the claim for the truck loan. It would be contrary to public policy and abuse of the process of law to allow any fresh proceeding for the same cause of action. The doctrine of election was also invoked. The loan with regard to the trunk industry was held to be time barred as no action was taken for recovery from 1996 till 2002.

12. The factum of loan is not in dispute. No explanation was furnished why the installments were not repaid and the loan closed. A pittance was repaid. The loan was disbursed from

public funds of the tax payers' money. The Respondent was a trustee for the loan amount. It could not become a windfall for him. All attempts by the Appellant for recovery were successfully thwarted by the Respondent by either filing a Suit or successive writ petitions. The sanguine confidence of the Respondent is also reflected by his failure to appear in the present proceedings despite valid service of notice.

13. The question whether there has been an abandonment of the claim by withdrawal of the Suit is a mixed question of law and fact as held in *Ramesh Chandra Sank/a vs. Vikram Cement*¹. The language of the order for withdrawal will not always be determinative. The background facts will necessarily have to be examined for a proper and just decision. *Sarguja Transport Service* (supra) cannot be applied as an abstract proposition or the ratio applied sans the facts of a case. The extract below is considered relevant observing as follows:-

"9 While the withdrawal of a writ petition filed in a High Court without permission to file a fresh writ petition may not bar other remedies like a suit "

14. The application for withdrawal stated that it was being done to pursue remedies under the Act. Undoubtedly the proceedings under the Act are more expeditious for recovery as compared to a Suit, which after decree is required to be followed by Execution proceedings. Section 3(1)(d)(iv) of the Act provided that the remedy under it was without prejudice to any other remedy available under any other law. The Appellant, therefore, never intended to abandon its claim by withdrawing the Suit. The language of the withdrawal order cannot be determinative without considering the background facts.

15. The bar under Order 23 Rule 1 would apply only to a fresh Suit and not proceedings under the Act. In *Sarva Shramik Sanghatana vs. State of Maharashtra*, (2008) 1 SCC 494, the application under Section 25-O of the Industrial Disputes Act, 1947 for closure of undertaking was withdrawn as attempts were made for settlement of the matter. Settlement not having been possible, the Management filed a fresh application. It was opposed as barred under Order 23 of the Code of Civil Procedure since the earlier application was withdrawn unconditionally with no liberty granted, relying on *Sarguja Transport Service* (supra). The argument was repelled holding that the proceedings under the Industrial Disputes Act were not a Suit and that withdrawal was bonafide to explore amicable settlement. It was not a withdrawal made malafide or for Bench hunting holding as follows:-

"22. No doubt, Order 23 Rule 1(4) CPC states that where the plaintiff withdraws a suit without permission of the court, he is precluded from instituting any fresh suit in respect of the same subject-matter. However, in our opinion, this provision will apply only to suits. An application under Section 25-O(1) is not a suit, and hence, the said provision will not apply to such an application."

16. In *Vikram Cement* (supra) the earlier petition was dismissed as not pressed and the second application was opposed as not maintainable. Dismissing the objection it was observed as follows:-

"65. It is thus clear that it was not a case of abandonment or giving up of claim by the Company. But, in view of the office objection, practical difficulty and logistical problems, the petitioner Company did not proceed with an "omnibus" and composite petition against several workmen and filed separate petitions as suggested by the Registry of the High Court."

17. The Act provides for recovery of certain dues as arrears of land revenue by sending a certificate to the Collector, mentioning the sum due requesting that the sum together with costs may be recovered. The High Court erred in holding that the H.P. Public Moneys (Recovery of Dues) Act, 2000 repealing the earlier Act did not contain any provision that the remedy was without prejudice to the rights under any other law. The proceedings in a Suit and recovery under the Act as arrears of land revenue are under different laws governed by different procedures. A Suit is instituted in a Court of law and is governed by the Code of Civil Procedure while the proceedings under the Act are before the executive statutorily empowered. *In C.C.E. vs. Ramdev Tobacco Company*², the distinction was noticed as follows:-

"6 There can be no doubt that 'suit' or 'prosecution' are those judicial or legal proceedings which are lodged in a court of law and not before any executive authority, even if a statutory one "

18. That the proceedings in a Suit could not be equated with a certificate proceeding was further noticed in *ESI Corpn. vs. C.C. Santhakumar*³, observing:-

"25 Therefore, it cannot be said that a proceeding for recovery as arrears of land revenue by issuing a certificate could be equated to either a suit, appeal or application in the court "

19. The phrase 'public policy' is not capable of precise definition. In *P.Rathinam v. Union Of India*⁴, it was observed:-

"92. The concept of public policy is, however, illusive, varying and uncertain. It has also been described as "untrustworthy guide", "unruly horse" etc...." Broadly it will mean what is in the larger interest of the society involving questions of righteousness, good conscience and equity upholding the law and not a retrograde interpretation. It cannot be invoked to facilitate a loanee to avoid legal obligation for repayment of a loan. The loanee has a pious duty to abide by his promise and repay. Timely repayment ensures facilitation of the loan to others who may be needy. Public policy cannot be invoked to effectively prevent a loanee from repayment unjustifiably abusing the law. Invocation of the principle of doctrine of election in the facts of the case was completely misconceived."

20. The High Court factually erred in holding that the trunk loan was time barred because the Appellant took no steps for recovery of the dues from 1996 till 2002 overlooking the Certificate dated 3.9.1994.

21. In conclusion, it is held that the proceedings in a Suit are essentially different from proceedings under the Act. The withdrawal of the Suit was no bar to proceedings under the Act. There was no bar under the Act to the proceedings. There had been no abandonment of claim by the Appellant. It would be contrary to public policy to prevent the Appellant from recovering the loan. The recovery proceedings were not time barred. The order of the High Court is held to be unsustainable and is set aside. The auction notice dated 13.01.2005/15.01.2005 under Section 85 of the Act shall now proceed in accordance with law and be concluded at the earliest expeditiously.

22. The appeal is allowed.

Judgment Referred.

¹(2008) 14 SCC 0058

²(1991) 2 SCC 0119

³(2007) 1 SCC 0584

⁴(1994) 3 SCC 0394