

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of Reserve : 04.08.2009

Pronounced on : 07.08.2009

+ I.A. No.2311/2005 (Order 7 Rule 11) & CS (OS) 1063/2002
IA Nos.5592/2002, 1311/2003, 9751/2008 and 4848/2005

S.N.F. ALLOYS PVT. LTD.

..... PLAINTIFF

Through : Mr. Jayant Bhushan, Senior Advocate with
Mr. Mahapatra, Advocate

Vs.

THE NATIONAL SMALL INDUSTRIES CORPORATION LTD.

..... DEFENDANT

Through : Mr. A.K. Thakur, Advocate

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

S.RAVINDRA BHAT, J.

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1. This order will dispose of an application under Order VII Rule 11, Code of Civil Procedure (CPC) filed by the defendant (hereafter "NSIC").

2. The brief facts, necessary for deciding this application are that the plaintiff filed this suit, for rendition of accounts against NSIC; it also seeks permanent injunction restraining NSIC from

recovering of any amount, alleged to be due from it (i.e. the plaintiff). The plaintiff had, in 1993, established a manufacturing unit Greater NOIDA. It manufactured aluminium alloy, using aluminium wire rods and scrap as raw material. The plaintiff claims that the State Bank of India was its banker during 1996, and subsequently, the Punjab and Sind Bank. It approached NSIC, for raw material assistance, to purchase ingots and wire rods for its manufacturing activities, from the National Aluminium Co Ltd (NALCO). The plaintiff has outlined the terms of such financial assistance, in Para 7 and 8 of the suit; it urges that NSIC required it to furnish a bank guarantee, to secure the transaction. The plaintiff contends that the arrangement was working satisfactorily when, with effect from December 1998 NALCO reduced the basic price for sale of ingots in the domestic market and also revised the interest free credit period for all categories of ingots. The plaintiff claims to have furnished additional security to NSIC, through letters of credit; this brought the total security so given, to Rupees 125 lakhs; it also led to a corresponding increase in the total credit limit offered to it. The plaintiff alleges about a transaction whereby it had to hypothecate its property in favour of NSIC on 10-02-1999 and also deposit title deeds with it. The plaintiff claims that NSIC encashed the bank guarantee for Rs. 50 Lacs in September 1999 and thereafter issuing a letter on 14-10-1999, demanding Rupees 60,28,088/- as on 30-09-1999, consisting of principal and interest as well service charges.

3. The plaintiff alleges that the NSIC stopped extending credit facilities thereafter; it also contends asking it (NSI C) to render accounts but without any avail. The plaintiff further alleges that its requests to lease out the hypothecated property too did not meet with a positive response; however later there was an agreement that the property could be leased out, to

meet the mounting liabilities. The plaintiff complains that when the arrangement had been smoothened out to the mutual satisfaction of the parties to the present suit, and was working satisfactorily, it suddenly received information that the NSIC had issued a false recovery certificate dated 23-11-2001 for recovery of about Rs. 93,05,816/-. It is submitted that the recovery certificate was issued by NSIC by unjustifiably inflating a small principal amount and by not crediting the amounts paid by it. It is submitted that after representations were made to NSIC's management, the recovery certificate was withdrawn by its letter dated 24-12-01. It is submitted that the letter admitted existence of discrepancies in the accounts maintained by NSIC.

4. According to the plaintiff, NSIC has not truly reflected the accounts between the parties in respect of the various transactions and not given credit to the amounts received by it. It is claimed that the plaintiff brought to the notice of NSIC all the irregularities and discrepancies through its letter dated 25-02-2002 and informed the latter that it was compelled to pay more than Rs. 35 Lakhs in the past which was not otherwise payable by it. On the basis of these allegations, the reliefs claimed in the suit are sought for.

5. The defendant besides other allegations, contends that the plaint is devoid of any cause of action. It claims that Clauses 29 and 32 of the Agreement (for raw material assistance, between the parties) bar the present suit. It also submits that being a financial institution, it has the discretion to extend or not extend credit after ensuring viability of the project and recovery of its dues. It alleges that no suit for damages is maintainable on account of not extending financial assistance. It is alleged that the entire cause of action if any, arose within the

jurisdiction of the courts in NOIDA; the plaintiff also hypothecated its property, at NOIDA and, merely because NSIC has a regional office in Delhi would not mean that the present suit can be entertained by this court. The NSIC also refers to Clause 41 of the Agreement, whereby the parties bound themselves that in the event of disputes, they would submit to Ghaziabad jurisdiction.

6. It is contended that provisions of the Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972 (hereafter referred to as "the Act") bar the present suit, which is to be rejected. It is urged on behalf of NSIC, that the agreement between the parties which is the subject matter of the suit, is of the kind referred to in Section 3 of the Act; by reason of Section 3 (5) every certificate issued to a Collector under sub-section (1) achieves finality and cannot be called into question in any court of law, whether by way of an original suit, application or in any reference to arbitration and no injunction can be granted by any court or other authority in respect of any action taken or intended to be taken pursuant to any power conferred under the Act.

7. Mr. Thakur, counsel for NSIC urged that it fulfils the description of a Corporation as defined by the Act, since it is notified under its provisions. It is argued that the nature of the transaction i.e. raw material assistance is one whereby advance or credit facilities are given by NSIC to the entrepreneur (such as the plaintiff in this case) for placing orders, to procure raw material. Learned counsel emphasized that the duties and obligations cast upon the parties in their agreement clearly point to NSIC being the beneficial owner of the property and that ownership in the goods passes only after the entrepreneur discharges its liabilities.

8. It is urged that the Act is a special legislation, enabling financial institutions to speedily recover their dues; the NSIC had moved for a recovery certificate, which was issued. However, the pendency of this case, and the interim orders made by this court have impeded the recovery of moneys from the plaintiff; they are public moneys for which a special mechanism, enacted through the Act should take precedence. The court should, it is submitted, give purposive interpretation to the said enactment to enable recovery of such amounts.

9. The plaintiff, arguing through its senior counsel, opposes the application and submits that the Act has no application to the present case. It is stated that the true nature of the transaction does not answer the description of sale of goods, or financial assistance for a state sponsored scheme, which are covered by Section 3. To attract the bar under Section 3(5), urges the plaintiff, the precondition is that transaction should fall under one or other of the descriptions, under Section 3 (1). Since that is not the case, here, the present suit is maintainable. The plaintiff relies on the authority of the Supreme Court in the judgment reported as *Iqbal Naseer Usmani V. Central Bank of India and Ors* 2006 (2) SCC 241, in support of its contention that this case is not covered by the Act.

10. The pleadings in the suit, and the applications filed by the parties show that the original certificate issued at the request of the NSIC, was withdrawn; this was reported to the court, on 17-06-2002. The plaintiff, on 29-01-2003, moved an application, I.A.No.1311/2003, contenting that the NSIC had caused another certificate to be issued, under the Act, (dated 20-01-2003) demanding Rs. 1,02,51,838/- from it. By an order dated 03-02-2003, this court had restrained operation of that certificate; the interim order has subsisted till date.

11. For a better appreciation of the controversy, it would be essential to notice the relevant provisions of the Act, which are as follows:

“3. Recovery of certain dues as arrears of land revenue.--(1) Where any person is party-

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

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State-sponsored scheme; or

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

(d) to any agreement providing that any money payable thereunder to the State Government shall be recoverable as arrears of land revenue; and such person-

(i) makes any default in repayment of the loan or advance or any instalment thereof; or

(ii) 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

(iii) otherwise fails to comply with the terms of the agreement, - then, in the case of State Government, such officer as may be authorized in that behalf by the State Government by notification in the official Gazette, and in the case of the Corporation or a Government company the Managing Director thereof, and in the case of a banking company, the local agent thereof, by whatever name called, may send a certificate to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue.

(2) The Collector on receiving the certificate shall proceed to recover the amount stated therein as an arrear of land revenue.

(3) No suit for the recovery of any sum due as aforesaid shall lie in the civil court against any person referred to in Sub-section (1).

(4) In the case of any agreement referred to in sub-section (1) between any person referred to in that sub-section and the State Government or the Corporation, no arbitration proceedings shall lie at the instance of either party either for recovery of any sum claimed to be due under the said sub-section or for disputing the correctness of such claim:

Provided that whenever proceedings are taken against any person for the recovery of any such sum he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment the proceedings shall be stayed and the person against whom such proceedings were taken may make a reference under or otherwise enforce an arbitration agreement in respect of the amount to be paid, and the provisions of Section 183 of the Uttar Pradesh Land Revenue Act, 1901, or Section 287-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as the case may be, shall mutatis mutandis apply in relation to such reference or enforcement as they apply in relation to any suit in the civil court.

(5) Save as otherwise expressly provided in the proviso to sub-section (4) of this section or in Section 183 of the U.P. Land Revenue Act, 1901 or Section 287-A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 every certificate sent to the Collector under sub-section (1) shall be final and shall not be called in question in any original suit, application (including any application under the Arbitration Act, 1940) or in any reference to arbitration, and no injunction shall be granted by any court or other authority in respect of any action taken or intended to be taken in pursuance of any power conferred by or under this Act."

4. Savings. -- (1) Nothing in Section 3, shall -

(a) affect any interest of the State Government, the Corporation, a Government company or any banking company, in any property created by any mortgage, charge, pledge or other encumbrance; or

(b) bar a suit or affect any other right or remedy against any person other than a person referred to in that section, in respect of a contract of indemnity or guarantee entered into in relation to an agreement referred to in that section or in respect of any interest referred to in Clause (a).

(2) Where the property of any person referred to in Section 3 is subject to any mortgage, charge, pledge or other encumbrance in favour of the State Government, the Corporation, a Government company or banking company, then --

(a) in every case of a pledge of goods, proceedings shall first be taken for sale of the thing pledged, and if the proceeds of such sale are less than the sum due, then proceedings shall be taken for recovery of the balance as if it were an arrear of land revenue:

Provided that where the State Government is of opinion that it is necessary so to do for safeguarding the recovery of the sum due to it or to the Corporation, Government company or banking company, as the case may be, it may for reasons to be recorded, direct proceedings to be taken for recovery of the sum due, as if it were an arrear of land revenue before or at the same time as proceedings are taken for sale of the thing pledged;

(b) in every case of a mortgage, charge or other encumbrance on immovable property, such property or, as the case may be, the interest of the defaulter therein, shall first be sold in proceedings for recovery of the sum due from that person as if it were an arrear of land revenue, and any other proceeding may be taken thereafter only if the Collector certifies that there is no prospect of realization of the entire sum due through the first mentioned process within a reasonable time.”

12. The agreement (for raw material assistance) was entered into, between the parties to this suit, on 07-03-1997; although the plaintiff has disputed that some parts of the agreement were “tampered with” inasmuch as, according to it, the NSIC filled in some blanks, as to the essentials, necessary to decide the issue in this application, there is no controversy. The agreement’s recital describes the First Party (NSIC) as “Financer and as Agent” that gives financial assistance to small scale industrial units otherwise not in a position to procure such raw material from canalized or governmental agencies against purchase orders. The recitals also show that NSIC agreed to act as financer and agent, to the plaintiff, for procurement of supplies and raw materials. Clause 1 authorizes NSIC, to procure the agreed materials (spelt out in the schedules to the agreement) on which the latter (the plaintiff) would place indent. Clause (2) authorizes the NSIC to place orders upon the canalizing or government agencies, to procure the material, on behalf of the plaintiff. Clause 4 spells out the plaintiff’s obligation to reimburse the cost of the material, and the time schedule for the purpose. Under Clause 5, the NSIC is entitled to administrative and processing charges. Clause 6 obliges the plaintiff to secure the amounts received through the assistance, from NSIC, for procurement of the material.

13. Clauses 7 and 8 of the Agreement are crucial for a decision in this case; both parties had relied upon it. They read as follows:

“7. That the Party of the Second Part hereby further hypothecates in favour of party of the First Part the goods described in general terms in the Schedule ‘ A’ and/or plant and machinery described in Schedule ‘B’ (hereafter referred to as he hypothecated goods) belonging to the Party of the Second Part, which now or hereinafter from time to time during this security, shall be bought (sic brought?) in stored or be or about the premises of godown of the Party of the Second Part at or wherever else the same may be.. as security for the payment by the parties of the Second Part to the Party of the First Part at any time or ultimately on the closing of the said lending facility and for the payment of all debts and liabilities mentioned in the clauses hereof.

8. That the hypothecated goods and all sales or realizations and insurance proceeds thereof shall be held as the party of the First Part's exclusive property specially appropriated to this security and the Party of the second part shall not create any mortgage, charges, liens or encumbrance affecting the same or any part thereof not do anything which would prejudice this security and the party of the Second Part shall not part with the hypothecated goods save by way of Sale in the Ordinary course of their business and as hereinafter provided nor shall any sale be made after prohibition in writing from the Party of the First Part against selling...”

14. The other relevant terms are that by clause 11, the goods are to be insured against fire, burglary, etc; default by the plaintiff in doing so, entitles the NSIC to purchase the policy and pay premia, which can be recovered from the former. In the event of fire, or any insurable incident, the amount payable would be received by the NSIC (clause 12); NSIC and its officers are entitled *“any time, as if absolute owners and without notice”* to the plaintiff, to take possession of the goods, to sell, appoint receivers, etc. to liquidate its (plaintiff's) liabilities (Clause 15). Clauses 16 to 18 deal with the NSIC's powers and discretion to sell the goods, and apply the proceeds of sale to adjust the plaintiff's outstandings. Clause 20 says that:

“ That this agreement is to operate as a continuing security for the balance from time to time due to the Party of the First part and also for the ultimate balance to become due on the said account and the said account is not to be considered to be closed for the purpose

of this security and the security of the hypothecated goods is not to considered exhausted by reason of the said account being brought to credit at any time from time to time or of its being drawn upon to the full extent..."

By clause 28, NSIC agreed to pay the taxes, provided the plaintiff reimbursed it. Clause 29 empowers NSIC to stop placing orders, without prejudice to its right to recover or claim amounts from the plaintiff. A similar power to stop placing orders is conferred upon NSIC, under Clause 32.

15. The agreement is facially one for "financial assistance" to the plaintiff, by the NSIC; however, a closer look at its terms would reveal that the latter (NSIC) has a deep and pervasive control over the goods. These are by way of the right to place purchase orders, on the suppliers, the right to receive the proceeds of sale (which the plaintiff can make, subject to NSIC's permission and authorization); in the event of a mishap, to receive insurance proceeds. The NSIC can also enter the plaintiff's premises, and seize goods, deal with them as it pleases, and sell them, to adjust the liabilities payable to it. Crucially, clause 8 records that the (hypothecated) goods would be held as (NSIC's) *"the First Part's exclusive property specially appropriated to this security."*

16. When the court has to interpret a document, oftentimes, the nomenclature adopted by the parties may not describe the transaction; it is the intention of the parties to the deed, which has to be gathered for a construction of the entire document (Ref. *Associated Hotels of India Ltd. v. R. N. Kapoor* AIR 1959 SC 1262; *Delta International Ltd. V. Shyam Sunder Generiwala* AIR 1999 SC 2607). Here, the nomenclature of the deed was "finance agreement"; yet NSIC was described as the party with "exclusive"

ownership, of the goods, with wide powers that may be properly described as attributes of an owner.

17. In the *Iqbal Naseer Usmani* decision of the Supreme Court, (supra), the question was as to applicability of the Act. The court held that:

"5. As the preamble to the Act suggests, it is an Act to provide, inter alia for "the speedy recovery of certain classes of dues payable to the State Page 582 Government or to the Uttar Pradesh financial Corporation or, any other Corporation notified by the State Government in that behalf or to any nationalised or other Scheduled Bank or to a Government Company....

6. There is no doubt that the first respondent is a banking company within the meaning of Section 2(f) of the Act. Section 3(b) of the Act provides that where any person is party "to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of or relating to hire-purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State-sponsored scheme" and such person makes any default in the repayment of the loan or advance or any installment thereof, on a certificate as to default along with a request from the concerned company to the Collector, the Collector shall proceed to recover the amount stated therein as arrears of land revenue. While there is no doubt that the appellant had obtained a loan from the first respondent-banking company and defaulted in repayment thereof there is no evidence to suggest that the loan was relating to hire-purchase of goods sold to him under a "State-Sponsored scheme." The learned Counsel for the respondent frankly conceded that the loan was not under any such "State-sponsored scheme." In our view, the provisions of the Act are not intended to supplant the machinery for execution of all decrees under the provisions of the Code of Civil Procedure. They can only be utilised for recovery of sums due in the special cases enumerated in Section 3(1) of the Act."

18. It is evident from the above extract of the decision that the Supreme Court had to decide whether a loan advanced by a Bank, was for the purpose of a "state sponsored scheme". Concededly, the Bank answered the description under Section 3(1)(b); yet, the facts did not

support the corporation or the state's plea that the loan was to advance the objective of a state sponsored scheme. In these circumstances, it was held that the Act did not apply.

19. Section 3(1)(a), which the NSIC relies upon, in the present suit, is in two parts; it applies to-

“any agreement”

(i) relating to loan, advance or grant given or

(ii) 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.

Each of the conditions, i.e. loan or advance or grant may be given by the State or the Corporation, by way of financial assistance; or the loan or advance or grant, may be relating to credit, in respect of hire purchase of goods sold by the State Government, or the Corporation, by way of financial assistance. Though seemingly connected, the first part (loan, advance or grant by the state or the Corporation) is independent of the second part. In other words, the Corporation's loan or grant, or advance may not relate to purchase of goods, sold by it; it may also relate to such goods sold to the concern or individual. Viewed from this angle, there is no dispute that the transaction between the parties was a “financial assistance” to procure raw materials. It certainly answered the description of the first part of Section 3(1)(a) of the Act.

20. Independent of the above finding, the court concludes that the advance or financial assistance, in this case, also was the result of a transaction where the property in the goods, first vested with the Corporation, by virtue of Clause 8 of the agreement, in view of the

previous discussion about the wide and pervasive powers agreed to be conferred upon it, by the parties.

21. When the plaintiff had approached this court, no doubt, the Corporation had indicated that the certificate stood withdrawn, during the end of 2001; yet, during the pendency of the suit, on 20th January, 2003, it issued another certificate for recovery of amounts. This court has by injunction interdicted the corporation from giving effect to that certificate. However, that was issued in exercise of statutory powers; the court cannot, unless it finds that such power was not available, maintain such an interim injunction. The discussion in the preceding part of this judgment has indicated that the agreement between the parties clearly fell within Section 3(1)(a). In these circumstances, the statutory mandate of finality, and the consequent bar to suit, would apply.

22. For the above reason, this court concludes that the present suit is not maintainable, as it is barred by virtue of Section 3 of the Act. The suit and all pending applications are hereby rejected. No costs.

23. Copies of this judgment be given dasti to the parties.

August 07, 2009

(S. RAVINDRABHAT)
JUDGE