2015 (0) SCJOnline(SC) 651 (FULL BENCH)
SUPREME COURT OF INDIA
T.S. THAKUR, ANIL R. DAVE, A.K. SIKRI
DECIDED ON : 19 June,2015
SECURITIES AND EXCHANGE BOARD OF INDIA (SEBI) Vs. SAHARA INDIA REAL ESTATE CORPN. LTD.

Constitution of India
CONTEMPT OF COURTS ACT

HEADNOTE
(A) Constitution of India , Article 21 - (B) CONTEMPT OF COURTS ACT, Section 12

div {text-align: justify;text-justify: inter-word;font-family: Verdana, Geneva, sans-serif;}p {padding-left:2%;}

1. 0) Insofar as the aforesaid prayer (i) in IA Nos. 62-64 of 2015 is concerned, having regard to the reasons mentioned in paras 4 and 5 of the application, which are stated in brief above, and the fact that the MOU is entered for an area of undeveloped land of 45.71 acres out of the total land area of 146 acres, coupled with the fact that there is slump in the real estate market, we allow the applicants to enter into Definitive Agreement, making it clear that the entire amount from the aforesaid deal shall be deposited in SEBI-Sahara Refund Account after adjusting transaction cost and taxes.
11) Insofar as prayers (i) and (ii) contained in IA Nos. 59-61 of 2015 are concerned, we are of the opinion that the stage for making such prayers has not ripened as yet. The Sahara group companies want to meet their statutory and other liabilities from the surplus that would be available after complying with order dated 26.03.2014. As soon as there is a compliance with the said order, this Court shall consider at that stage the availability of the surplus funds along with other factors and then pass appropriate orders on these applications. It is necessary to mention that even after order dated 26.03.2014 is complied with, there is a huge deficit in the form of balance amount that would still be required to be deposited by the applicants/contemnors in order to comply with the directions contained in the orders dated 31.08.2012 and 05.12.2012 passed by this Court in the civil appeals. Therefore, orders on the prayers made in IA Nos. 59-61 of 2015 are deferred for the time being.
12) Coming to the format of the guarantee given by the applicants, on which the applicants want seal of approval from this Court in order to enable them to submit the requisite bank guarantee, we would like to reproduce the same, which reads as follows:
" GUARANTEE
We _____ Bank, a scheduled Bank within the meaning of the Banking Regulation Act, and having our office at _____ do hereby grant and issue this unconditional and irrevocable guarantee of Rs.5000 crores (rupees five thousand corres) in favour of Securities and Exchange Board of India (SEBI) at the request made by Amby Valley (Mauritius) Ltd. on behalf of Sahara

India Real Estate Corporation Ltd. and Sahara Housing Investment Corporation Ltd., in compliance with the order of the Hon'ble Supreme Court of India dated 26th March 2014.
We hereby guarantee that on the demand in writing made by SEBI, we shall, without demur, pay the amount demanded upto the maximum amount of Rupees Five Thousand Crores.
This guarantee shall remain in force initially for a period of six months and shall be extended for further periods of six months at the time, until SEBI otherwise directs pursuant to the order of Hon'ble Supreme Court."

13) SEBI has given its nod to the aforesaid format. Likewise, Mr. Shekhar Naphade, learned amicus appointed by this Court, has made a statement that the guarantee to be furnished in the aforesaid format may be accepted. At the same time, Mr. Arvind Datar, learned senior counsel appearing for SEBI, as well as Mr. Naphade were very emphatic in pointing out that this Court should indicate in its order as to what should be the trigger point for encashing the bank guarantee. In other words, it was their submission that insofar as balance amount payable by the applicants/contemnors is concerned, this Court may give some specified time to them for this purpose and on the contemnors/applicants failure to deposit the balance amount, with accrued interest with SEBI, SEBI should be allowed to encash the bank guarantee in question.

14) M/s. Kapil Sibal, Rajeev Dhawan and S. Ganesh, learned senior counsel appearing for the applicants, on the other hand, submitted that it is not necessary to go into this aspect at this stage. They pointed out that last para of the bank guarantee categorically mentions that the guarantee is to remain in force 'until SEBI otherwise directs, pursuant to the orders of the Hon'ble Court' and, thus, this Court can direct at any stage as at what point of time the bank guarantee is to be encashed. Their argument was that the applicants have refunded almost Rs.16,000 crores to the investors and voluminous record of documents in support thereof has already been handed over to SEBI. It is for the SEBI to verify the same and inform as to what would be the balance amount payable after adjustment of the amounts already paid to the investors and to the extent it is found to be genuine, the same be refunded. They submitted that it is SEBI which is not fulfilling its part of obligation by going into the verification of those documents, for which applicants cannot be blamed or prejudiced.

15) Since this aspect was hotly debated at the Bar, we have gone into the same in some depth and detail. We find that the issue of refund of Rs.17,000 crores approximately to the depositors has been raked up by the contemnors/applicants time and again, but to their dismay, this Court has not accepted their plea to this effect, so far. In the writ petition (Writ Petition (Criminal) No. 57 of 2014, titled Subrata Roy Sahara v. Union of India & Ors., (2014) 8 SCC 470), this very plea of exempting the applicants from depositing the amount already redeemed by them was considered at length and rejected. In the said judgment, the Court took note of and expressed its opinion on this aspect at various places. In para 55 of the judgment, the Court observed that such a plea was not accepted even earlier by a three Judge Bench while disposing of Civil Appeal No. 8643 of 2012 vide order dated 05.12.2012, in the following manner:

"During the pendency of the contempt proceedings, we also decided to determine the veracity of the redemption theory, projected by the two companies. As a matter of law, it was not open to the two companies to raise the aforesaid defence. This is because, exactly the same defence was raised by the two companies, when they had approached this Court by filing Civil Appeal No. 8643

of 2012 (and Writ Petition (Civil) No. 527 of 2012). In the aforesaid Civil Appeal, it was submitted on behalf of the two companies that they should be exempted from depositing the amount already redeemed by them. The above contention advanced by the two companies was not accepted, by the three Judge Division Bench, when it disposed of Civil Appeal No. 8643 of 2012 (and Writ Petition (Civil) No. 527 of 2012) by order dated 5.12.2012. It is, therefore, apparent that the instant defence of having already redeemed most of the OFCD's was not open to the two companies (and even the contemnors). Yet, so as to ensure that no injustice was done, we permitted the two companies to place material on the record of this case to substantite the factum of redemption. (emphasis supplied)"

16) The Court, thus, went into this issue again permitting the two companies to place requisite material on record to substantiate the factum of redemption and took into consideration whatever material was placed on record. However, it refused to accept the plea of the two companies, which is clear from the following discussion in paras 86 and 108 of the said judgment:

"When asked how disbursements were made to the investors, the response was that 95% of the payments made to the investors were also made by way of cash, the learned Senior Counsel representing the Contemnors (including the petitioner herein) invited our attention to the books of accounts (only general ledger entries) to demonstrate proof of the transactions under reference. Details in this behalf have been recorded by us under heading IX: "A few words about the defence of redemption of OFCDs offered by the two Companies". The above explanation may seem to be acceptable to the contemnors, but our view is quite the converse. It is not possible for us to accept that the funds amounting to thousands of crores were transacted by way of cash, we would therefore, on the face of it, reject the above explanation tendered on behalf of the two Companies."

17) The Court further found that in order dated 05.12.2012 in Civil Appeal No. 8643 of 2012, balance amount of Rs.17,400 crores, together with interest @ 15% per annum, was still payable even after the deposit of Rs. 5,120 crores. It further mentioned that this figure has swelled up to Rs. 36,608 crores. Thereafter, the position was concluded in para 154 as under:

"Therefore, viewed from any angle, there is no substance in the contention advanced on behalf of the two companies that the moneys payable to the investors had been refunded to them. Accordingly, there is no merit in the prayer, that while making payments in compliance with this Court's orders dated 31.08.2012 and 05.12.2012, the two companies were entitled to make deductions of Rs. 17,443 crores (insofar as SIRECL is concerned) and Rs.5,442 crores (insofar as SHICL is concerned)."

18) The aforesaid discussion clinchingly shows, without any cavil of doubt, that the contemnors/applicants have failed to give satisfactory proof of redemption of Rs.17,400 crores by SIRECL and Rs. 5,442 crores for SHICL.

19) Mr. Sibal, however, drew our attention to certain lines appearing in paragraph 154 of the same judgment and submitted that it is still open to the applicants to demonstrate that the aforesaid amount is redeemed to the depositors and virtually nothing more is payable. This window which was still kept open by the Court in the said paragraph is in the following form:

"154. "...Be that as it may, we have still retained a safety valve, inasmuch as, SEBI has been directed to examine the authenticity of the documents produced by the two Companies, and in

case SEBI finds that redemptions have actually been made, the two Companies will be refunded the amounts, equal to the redemptions found to have been genuinely made."

2. 0) No doubt, this much scope is still left for Sahara group. Fact remains that a definite course of action that is to be chartered is also laid down, namely, in the first instance it is obligatory on the part of the contemnors/applicants to deposit the entire balance amount along with interest accrued thereon in the SEBI-Sahara Refund Account. This obligation has to be performed in all circumstances. It is only thereafter, if and when the applicants are able to substantiate the factum of redemption, they would be entitled to refund of the said amount to the extent they are able to prove in this behalf. Therefore, at this stage, one thing which is more than apparent is that after the conditions for interim bail stipulated in order dated 26.03.2014 are fulfilled and pursuant thereto the three contemnors who are in judicial custody are released, the obligation or liability to deposit the balance would still remain. We may remind the contemnors that as per directions dated 05.12.2012, this amount was to be deposited in two installments, first installment by the first week of January 2013 and the second by the first week of February 2013. Therefore, it would be essential for the applicants/contemnors to not only to deposit the balance amount in a time bound schedule but also the manner on which they propose to muster the said amount. This cannot go on endlessly.

21) We are conscious of the fact that three persons are under confinement for the last fifteen months. The circumstances under which orders dated 04.03.2014 were passed taking these persons into custody and sending them to jail are well known. This court was virtually compelled to do so, going by the stubborn attitude of the contemnors in taking the orders dated 31.08.2012 and 05.12.2012 for granted, as if those orders were only on papers and were not meant to be complied with. So many opportunities were given, showing all that leniency which could be extended, to enable the contemnors to comply with those directions. It is only when the Court felt that unless some drastic action is taken there will be no desired effect, that this extreme step was taken. However, this step was taken in good faith to uphold the rule of law and to ensure that dignity of this Court is maintained and there is faithful compliance with its directions. The contemnors, instead of taking steps to follow and fulfil the directions, started making hue and cry. Still, in the application filed immediately thereafter for release, this Court showed desired compassion and empathy by passing orders dated 26.03.2014, thereby paving a way for grant of interim bail. It was, however, with a legitimate condition that out of almost Rs.33,000 crores that had become due by that time, the contemnors deposit at least Rs.10,000 crores, that too with relaxed provision of deposit of 50% thereof by means of bank guarantee only. There was a genuine hope that for the sake of attaining their own freedom, the contemnors shall at least comply with this direction immediately. Since then, though there have been attempts on the part of the contemnors to do the needful, but all in vain. This is notwithstanding the fact that insofar as this Court is concerned, it has shown and extended all support in the form of giving desired facilities in jail; lifting the attachments in respect of those properties chosen by the applicants themselves, for sale/ encumbrances etc.; allowing these applicants to accept the offer of lesser amount than the book value of a particular asset, going by the fact that these were akin to distress sales in a depressed real estate market. May be the applicants now see the light at the end of the tunnel as it is projected that the Sahara companies has finally found the buyers for certain assets and/or

financers who are ready to provide the requisite finance against some of the Sahara Companies properties and that would bridge the gap insofar as conditions of interim bail are concerned. However, as mentioned above, the matter does not rest with the deposit of Rs.5,000 crores and Rs.5,000 crores by way of bank guarantee. Total liability has swelled to more than Rs.36,000 crores. The aforesaid deposit of Rs.10,000 crores is only a condition of interim bail. It is the bounden duty of this Court to ensure that balance amount is also deposited by the applicants.

22) This Court feels concerned with the fact that three persons are deprived of their liberty for the last fifteen months and this situation is quite onerous to them. On the other hand, public interest as well as public good demands that the two Sahara Companies, which had collected whopping amount of more than Rs.22,000 crores from the public in an illegal and unauthorised manner, are made accountable for the same in the manner it is directed vide orders dated 31.08.2012 and 05.12.2012. By any yardstick, this is a huge liability, which the contemnors are bound to discharge by depositing the same with SEBI. It is, thus, an unprecedented situation of personal liberty of the three applicants on the one hand vis a vis majesty of law and ensuring larger public good, on the other hand. It is this sense of justice, in an unprecedented kind of situation, that has compelled the Court to take such an extreme step. It is this legal realism which has compelled the Court to adopt an approach which sounds more pragmatic. It is "doing what comes naturally" approach to the problem at hand, which required such a drastic step, going by the experience of this case, giving rise to 'Reflection' that provided 'Understanding'. This case is a burning example where the true dictate of justice is difficult to discern, and the law needed to come down on the side of practical convenience. We may borrow the jurisprudential theory propounded by Ronald Dworkin, albeit in somewhat different context, viz. the "conventional jurisprudential wisdom" which holds that in certain cases of a particularly complex or novel character the law does not provide a definite answer. In denying that judges in hard cases have a discretion to determine what the law is, Dworkin has instead argued for the judicial use of public standards or principles in a way that is capable of providing the right legal answer. The process of reaching a right answer in hard cases obviously differs from the process of reaching the legal answer in easy cases. After all, the avowed objective of rule of law is also to ensure that the orders of this Court are respected and obeyed. Therefore, its a classic case where the approach adopted is influenced by the necessity of "making the law work". Therefore, the orders passed may not be strictly construed as arising out of contempt jurisdiction, but in exercise of inherent jurisdiction vested in this Court to do complete justice in the matter and to ensure that the applicants render full compliance of its orders. It's the unprecedented situation which has led to passing of unprecedented, but justifiable, orders.

23) This Court is not powerless as it can always direct selling the properties of the Sahara Companies to ensure recovery of the aforesaid amount as the value of those properties is stated to be much higher. However, it is not done so far pursuant to the wishes of the applicants who have pleaded against the sale of these properties by the Court with repeated assurances that these companies would be taking necessary steps for generating the desired finances and the Court has accepted their request and given them opportunities and chances to do so.

24) Shri Datar, Senior Counsel for SEBI and Shri Naphade, Amicus Curiae contended and in our view rightly so, that if the format of the bank guarantee is accepted, this Court ought to indicate the circumstances in which the SEBI can seek encashment of the said guarantee. It was argued that

the Bank Guarantee as furnished by the contemnors did not indicate a trigger point for encashment which ought to be suitably mentioned and entered either in the guarantee or in the order of this Court. It was further argued that release of the contemnors from the custody even after deposit of a sum of Rs.5000 crores and a bank guarantee of Rs.5000 crores pursuant to the order of this Court was meant only to enable them to deposit the balance amount. It was submitted that in case the contemnors comply with the conditions for release from custody, the next thing they must do is to comply with the directions regarding deposit of the balance amount. This Court, it was argued, should not only direct the deposit of balance amount but provide for the consequences in default of such deposits.

The bank guarantee format does not provide for a trigger point for its encashment. Furnishing the bank guarantee without stipulating the situations in which the guarantee shall become encashable, will be meaningless. The Bank guarantee is actually meant to ensure that the entire amount is deposited by the contemnors once they are released from custody. That is because the liability to deposit the amount does not get obliterated by furnishing the bank guarantee which is intended to grant release of the contemnors from custody to enable them to comply with the orders passed by this Court. We have in that view examined several options that may provide for a trigger point for encashment. We are of the view that since most of the properties owned by Sahara group remain frozen by the order of this Court, the contemnors require time to enable them to deposit the balance outstanding. In case the bank guarantee is made encashable on default, the trigger point for encashment would be the default by the contemnors in depositing the balance amount in terms of the directions that we propose to issue. It is in that spirit that we accept the bank guarantee format furnished by the contemnors and grant to them time to deposit the balance amount that remains to be deposited subject to the following conditions:

(1) Keeping in view the total liability which according to SEBI, has risen to Rs.36,000 crores (approximately), the contemnors shall deposit the balance outstanding amount within a period of 18 months commencing from the date of their release from custody in nine installments. First eight installments shall be of Rs.3,000 crores payable every two months from the date of their release from custody and last installment shall be of the remaining amount.

(2) In the event of the default in payment of two instalments (not necessarily consecutive) the bank guarantee furnished by the contemnors pursuant to the order of this Court shall be encashed by SEBI and the amount so received counted towards part compliance with the earlier directions given by this Court.

(3) The bank guarantee shall also be encashable in the event of failure of the contemnors to deposit the full amount outstanding against them within a period of 18 months commencing from the date of their release.

(4) In the event of failure of the contemnors to deposit three instalments (not necessarily consecutive), the contemnors shall surrender back to custody and in case they fail to do so, they shall be taken into custody and committed to jail.

(5) Since only some of the properties have been released by this Court for sale by the contemnors, the contemnors shall be free to apply for permission to sell any further property within 15 days from their release in order to enable them to raise funds for deposit of the required amount in terms of the order of this Court.

(6) Keeping in view the fact that a large amount remains to be deposited by the contemnors, we direct the contemnors to deposit their passports in this Court within 15 days from the date of this order or before their release, whichever is earlier. They shall not leave the country without prior permission of this Court. Insofar as their movements within the country are concerned, they shall keep police station Tilak Marg, New Delhi informed and updated about their whereabouts every fortnight.

25) The Interlocutory Applications stand disposed of on the aforesaid terms.

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