

J&K Integrated Textile Park Limited vs Union Of India And Ors on 14 October, 2022

Author: Rajnesh Oswal

Bench: Rajnesh Oswal

HIGH COURT OF JAMMU & KASHMIR AND LADAKH
AT JAMMU

Reserved on : 19.09.2022
Pronounced on : 14.10.2022

WP(C) No. 606/2021 (O&M)

J&K Integrated Textile Park Limited

.....Appellant(s)/Petitioner(s)

Through: Mr. Pranav Kohli, Sr. Advocate with
Mr. Arun Dev Singh, Advocate

Vs

Union of India and ors.

..... Respondent(s)

Through: Mr. Vishal Sharma, DSGI
Mr. Parveen Kapahi, Advocate
Ms. Monika Koihli, Advocate

Coram: HON'BLE MR. JUSTICE RAJNESH OSWAL, JUDGE
HOB'BLE MR. JUSTICE RAJESH SEKHRI, JUDGE

JUDGMENT

Per Oswal-J

1. In the present writ petition, the petitioner has sought for the following reliefs:

- i.) Certiorari seeking quashment of the e-auction Notice dated 13.02.2021 and 06th March, 2021, by virtue of which e-auction is scheduled on 25th and 30th March, 2021 to the extent of factory and buildings owned by the petitioner SPV.
- ii) Prohibition restraining the respondent No. 3-Bank from proceeding further with the impugned e-auction notices dated 13.02.2021 and 06.03.2021, by virtue of which e-auction is scheduled on 25th and 30th March, 2021 in any manner.

iii) Mandamus commanding upon the respondents to delete and exclude the factory and buildings owned by the petitioner SPV from the e-auction notices dated 13.02.2021 and 06.03.2021.

iv) Mandamus commanding upon the respondent No. 3-Bank to de-seal the factory and consequently release the actual physical possession of the factory and buildings of the petitioner SPV.

2. The case projected by the petitioner in this writ petition is that petitioner-

J&K integrated Textile Park Limited, is a Company incorporated under the Companies Act on 15th March 2009 and the main object of the petitioner- company is to act as a Special Purpose Vehicle for implementing different schemes of the Central/State Governments. The petitioner pursuant to the Scheme for Integrated Textile Park (SITP) floated by the respondent No. 1, made a proposal for establishment of Textile Park Project and that was approved by the respondent No. 1, initially with project cost Rs. 47.11 crores. Subsequently, the project cost was changed to Rs. 44.11 crores. The Government of India grant for project was changed from Rs. 40.00 to Rs. 39.70 crores. As per Clause 2.4 of the Scheme (supra), the total project cost for the purpose of the scheme includes cost on account of ITP components as listed under Groups B, C & D provided the ownership of the factory and buildings vests with the Special Purpose Vehicle. The land, that formed component A of Scheme, was not included in the total project cost.

3. The petitioner was allotted 200 kanals of land at Industrial Estate Govindsar, Kathua. The lease deed dated 22.03.2012 came to be executed between the respondent No. 2 and the petitioner for a period of 90 years. Thereafter, Memorandum of Agreement dated 29th May, 2013 also came to be executed between the petitioner and respondent No. 1.

4. The petitioner in turn claims to have executed Lease Agreement with the nine units holders, namely, J and K Textorium Pvt. Ltd, Green Textorium Pvt. Ltd., J and K Synthetic Pvt. Ltd., Silklon Synthetic Pvt. Ltd., Toplon Industries Pvt. Ltd, Natural Industries, Orbit Spinning Pvt. Ltd., Jyotsna Industries Pvt. Ltd. and Silklon Processors Pvt. Ltd. The petitioner has placed on record Lease Agreement dated 28th December, 2013 executed between the petitioner and Toplon Industries Pvt. Ltd. i.e. respondent No. 8. It needs to be noted that the lease agreements executed with other unit holders have not been placed on record. As per the lease agreement dated 28 th December 2013, the lessee units cannot claim any ownership on the demised premises and the ownership of the demised premises shall always vest with the petitioner SPV.

5. The petitioner further claims to have executed the Tripartite Agreements with the respondent No. 2 and the unit holders as mentioned above. As per the terms and conditions of the Tripartite Agreement, the third party i.e. unit holders shall be under an obligation to pay the annual rent to the petitioner. It needs to be noted that the petitioner has placed on record the Tripartite Agreement executed between the petitioner and respondent No. 8 only.

6. It is further stated that the respondent No. 2 communicated to the Oriental Bank of Commerce, now Punjab National Bank vide communications dated 04.05.2016 and 22.03.2017 that in the event

foreclosure of the unit or its transfer to 3rd party is necessitated, the Bank has to seek prior written permission from the State Industrial Development Corporation Limited (SIDCO) to place the third party in the shoes of the lessee.

7. It is further pleaded that proforma respondents (units) have availed loan facility from the respondent No. 3 and defaulted in the repayment. Their accounts were declared as „Non-Performing Assets (NPA). Notices under Section 13 of the Securitization and Reconstruction of Financial Assets and Enforcement of Securities Interest, 2002 (hereinafter to be referred as the SARFAESI Act) were issued to the units and the physical possession of the units has been taken over by the respondent No. 3-Bank. The proforma respondent Nos. 4 to 8 preferred the applications under Section 17/17A of the SARFAESI Act. All these applications were dismissed by the concerned Court. Thereafter, the respondent No. 3 issued e-auction notices dated 13.02.2021 and 06.03.2021, by virtue of which e-auction was scheduled to be held on 25th and 30th March 2021 with regard to the factory and buildings owned by the petitioner SPV. The petitioner has sought quashing of these notices to the extent of factory and buildings allegedly owned by the petitioner SPV and other reliefs inter alia on the ground that land underneath the factory and buildings has been leased out to the respective units as per the Tripartite Agreement between the petitioner, SIDCO and the unit holders. The unit holders have no right of ownership or otherwise over the factory and buildings. Therefore, the respondent No. 3 cannot put an auction for sale the factory and buildings, which are exclusively owned by the petitioner SPV and e-auction notices are violative of „the Scheme for Integrated Textile Parks’, as e-auction does not envisage that the auction is for Textile or related services alone. It is also stated that respondent No. 2 vide communications dated 4th May 2016 and 22nd March 2017 has clarified in unequivocal terms that in the event of the foreclosure of the unit or its transfer to the third party, the Bank has to obtain a prior written permission from the SIDCO to place the third party into the shoes of the units and further that the factory and buildings vests with the petitioner and in fact the Ministry of Textiles is the owner of the factory and buildings (ground-d).

8. Objections have been filed by the respondent No. 3, the main contesting party. Preliminary objection has been raised by the respondent No. 3 that the present writ petition is not maintainable and the grievances projected by the petitioner are required to be projected before the Debt Recovery Tribunal, Chandigarh, which has the jurisdiction to entertain the application of the borrower or any other person as envisaged under section 17 of the SARFAESI Act. It is also stated that the real owner of the said property is respondent No. 2, Jammu and Kashmir, State Industrial Corporation Limited and has leased out the same to the petitioner by way of Registered Lease Deed dated 22.03.2012. The petitioner has further transferred the lease hold rights of the property along with the premises made thereupon to the individual units by way of Tripartite Agreements executed on various dates i.e. 30.11.2015 with Toplon Pvt. Ltd.; 22.05.2015 with Green Textorium Pvt. Ltd. 22.05.2015 with J&K Synthetic Pvt. Ltd. 22.05.2015 with Siklon Synthetic Pvt. Ltd. 22.05.2015 with J&K Textorium Pvt. Ltd. 22.05.2015 with Orbit Spinning Pvt. Ltd. 22.05.2015 with Jyotsna Pvt. 22.05.2022 with Silklon Processors Pvt Ltd. It is further averred that the Promoters/Directors of the petitioner in one way or other way are also Promoters/Directors in the individual units i.e. the respondents Nos. 4 to 12 as in unit of respondent No. 10, the petitioner himself is a Director and his Son Kush Aggarwal is also a Director in respondent No. 8 and respondent No. 10. It is also stated that the property, which

is owned by respondent No. 2 was subsequently leased out to the petitioner and thereafter to the units i.e. respondent Nos. 4 to 12 and they have mortgaged the same in favour of respondent No. 3 and in the lease deeds itself there is a covenant that the land along with constructions has been leased out to the lessees and with the permission of lessor the lessees are entitled to mortgage the leased premises i.e. land and buildings in favour of respondent No. 3/Financial Institution. It is also stated that the Lease Agreement dated 28.12.2013 executed by the petitioner and the individual units, is bad in the eyes of law as the same has been executed without the consent of lessor-J&K SIDCO, that is sine qua non for execution of any such documents and further that this agreement has only been notarised. It is also stated that the proforma respondents had filed applications under Section 17- A of the SARFAESI Act but their applications were dismissed by the learned Principal District and Sessions Judge, Kathua. The respondent No. 3 has placed on record the orders passed by the Pr. District Judge, Kathua dismissing the applications filed by the proforma respondents and also the deeds of mortgage as collateral security. In nutshell, the stand of respondent No. 3 is that the present writ petition is not maintainable, as the petitioner has equally efficacious remedy available under the SARFAESI Act and further that the petitioner has raised disputed questions of facts and also that the present writ petition in fact is a proxy litigation filed on behalf of the respondent Nos. 4 to 12, who have already lost their respective cases before the Principal District Judge, Kathua.

9. Mr. Pranav Kohli, learned senior counsel for the petitioner vehemently argued that as per the scheme for Integrated Textile Parks, the buildings vest with the petitioner and the petitioner has not availed any loan, so the respondent No. 3 could not have issued the e-auction with respect to the building though the respondent No. 3 could have proceeded against the other secured assets of the respondent No. 4 to 12.

10. On the other hand, Mr. Parveen Kapahi, learned counsel for the respondent No. 3 vehemently argued that the writ petition is not maintainable as the petitioner has equally efficacious remedy in terms of Section 17 of SARFAESI Act. He further argued that the building stood already mortgaged with the respondent No. 3 and the disputed questions of facts have been raised by the petitioner, those cannot be adjudicated upon in the present writ petition. He laid much stress that the present writ petition has been filed by the petitioner on behalf of respondent Nos. 4 to 12 after their applications were dismissed by the Principal District Judge, Kathua and further that the person, who has filed the writ petition on behalf of the company, in one way or the other is Promoter/Director in the respondent Nos. 4 to 12.

11. Heard learned counsel for the parties and perused the record.

12. Before appreciating the rival contentions of the learned counsel for the parties, it would be advantageous to take note of the law laid down by the Hon ble Apex Court in United Bank of India vs. Satyawati Tondon and Others, (2010) 8 SCC 110. In paragraphs 43 to 46, it has been observed and held as under:

"43 Unfortunately, the High Court overlooked the settled law that the High Court will ordinarily not entertain a petition under Article 226 of the Constitution if an effective

remedy is available to the aggrieved person and that this rule applies with greater rigour in matters involving recovery of taxes, cess, fees, other types of public money and the dues of banks and other financial institutions. In our view, while dealing with the petitions involving challenge to the action taken for recovery of the public dues, etc., the High Court must keep in mind that the legislations enacted by Parliament and State Legislatures for recovery of such dues are code unto themselves inasmuch as they not only contain comprehensive procedure for recovery of the dues but also envisage constitution of quasi judicial bodies for redressal of the grievance of any aggrieved person. Therefore, in all such cases, High Court must insist that before availing remedy under Article 226 of the Constitution, a person must exhaust the remedies available under the relevant statute.

44. While expressing the aforesaid view, we are conscious that the powers conferred upon the High Court under Article 226 of the Constitution to issue to any person or authority, including in appropriate cases, any Government, directions, orders or writs including the five prerogative writs for the enforcement of any of the rights conferred by Part III or for any other purpose are very wide and there is no express limitation on exercise of that power but, at the same time, we cannot be oblivious of the rules of self-imposed restraint evolved by this Court, which every High Court is bound to keep in view while exercising power under Article 226 of the Constitution.

45. It is true that the rule of exhaustion of alternative remedy is a rule of discretion and not one of compulsion, but it is difficult to fathom any reason why the High Court should entertain a petition filed under Article 226 of the Constitution and pass interim order ignoring the fact that the petitioner can avail effective alternative remedy by filing application, appeal, revision, etc. and the particular legislation contains a detailed mechanism for redressal of his grievance.

46. It must be remembered that stay of an action initiated by the State and/or its agencies/instrumentalities for recovery of taxes, cess, fees, etc. seriously impedes execution of projects of public importance and disables them from discharging their constitutional and legal obligations towards the citizens. In cases relating to recovery of the dues of banks, financial institutions and secured creditors, stay granted by the High Court would have serious adverse impact on the financial health of such bodies/institutions, which ultimately prove detrimental to the economy of the nation. Therefore, the High Court should be extremely careful and circumspect in exercising its discretion to grant stay in such matters. Of course, if the petitioner is able to show that its case falls within any of the exceptions carved out in *Baburam Prakash Chandra Maheshwari v. Antarim Zila Parishad* AIR 1969 SC 556, *Whirlpool Corporation v. Registrar of Trade Marks, Mumbai* (1998) 8 SCC 1 and *Harbanslal Sahnia and another v. Indian Oil Corporation Ltd. and others* (2003) 2 SCC 107 and some other judgments, then the High Court may, after considering all the relevant parameters and public interest, pass appropriate interim order.

13. The preliminary issue raised by the respondent No. 3 is with regard to the maintainability of the writ petition. As per Section 17 of the SARFAESI Act, any person including the borrower aggrieved by any of the measures referred to in sub-section 4 of Section 13 of SARFAESI Act, taken by the secured creditor or his authorised officer may make an application along with such fees to the Debts Recovery Tribunal having jurisdiction in the matter within forty five days from the date such measures had been taken. The petitioner in the present writ petition has specifically prayed for issuance of a direction to the respondent No. 3-Bank to de-seal the factory and buildings and consequently release the actual physical possession of the factory and buildings. The respondent Nos. 4 to 12 had availed their statutory remedy and rightly so, but their applications were dismissed by the Principal District and Sessions Judge, Kathua.

14. Further, Hon ble Apex Court in Jagdish Singh vs. Hira Lal and others, 2014 (1) SCC 479 has held that expression „any person used under Section 17 of the SARFAESI Act is of wide import and take within its hold not only the borrower but also the guarantor or any other person, who may be effected by the action taken under Section 13 (4) of SARFAESI Act.

15. In view of the above, we are of the considered view that the petitioner has an equally efficacious remedy under Section 17 of SARFAESI Act, as such, the present writ petition is not maintainable.

16. Besides this, we find that disputed questions of facts have been raised by the petitioner in the present writ petition. It is the case of the petitioner that ownership of the buildings vests with the petitioner and the respondent Nos. 4 to 12 have no right in the buildings, though they had acquired the lease hold right over the land underneath the buildings. It would be appropriate to take note of the paragraph 8 of the Tripartite Agreement placed on record by the petitioner executed between the petitioner and respondent No. 8 (page 89, annexure-12).

"That the second/third party shall have the right and authorization to raise the necessary construction (factory building etc.) on the leased premises which are required and necessary to be constructed in connection with the purpose of establishing/installing the said industrial unit. However, before erecting such constructions the second/third party shall get the same duly approved from the competent authority and shall erect and construct the same strictly in accordance with the said permission as approved and granted by the competent authority for the purpose. The said constructions shall be also made and erected in accordance with the norms and specifications as laid down in the project report and the bye laws of the SIDCO and also other directions and the instructions issued by first party from time to time in this behalf. If any deviation is committed by second/third party in erection of the said constriction as per the approved or Project report or bye laws of SIDCO and other directions /instructions of the first party, the first party shall be within its rights to demolish and raise down the said deviation or the whole construction as it deems expedient and necessary and the second/third party shall neither be eligible nor possesses any right to claim any sort of compensation from first party for the loss occasioned to the second party on this account."

17. The second party is the petitioner and the third party in the tripartite agreement is the respondent No.8. It is not in dispute that the land stood mortgaged with respondent No. 3 and there is nothing on record to demonstrate as to whether any permission was sought by the petitioner from the respondent No. 2 for the purpose of raising any construction or building in terms of Clause 8 of the Tripartite Agreement. No such permission has been placed on record by the petitioner. Deed of Mortgage as Collateral Security dated 11.03.2017 executed by M/S Toplon Industries Pvt. Ltd. through its Director Kush Aggarwal s/o Ram Avtar Aggarwal in favour of respondent No. 3 contains an averment that Mortgagor No.1 (M/S Toplon Industries Pvt. Ltd.) is the sole and absolute lessee in possession over Unit no.10 and plot of land underneath measuring 21 kanal and 10 marlas situated at J&K Integrated Textile Park Ltd, near IID Center Tehsil and District Kathua (Page -1 of the Deed). It is further averred in the Deed (Page-3) that the mortgagee has agreed to accept as collateral security for the payment of the loan together with the interest and charges the mortgage of the aforesaid parcel of the property along with all appurtenants (the said parcel of the land and plant/machinery and other fixtures and construction existing or to be raised thereon as aforesaid may also be referred to as mortgaged premises) as primary security. Thus the construction existing or future has been mortgaged with the respondent No. 3. The unregistered lease agreement dated 28.12.2013 executed between the petitioner and M/S Toplon Industries Pvt. Ltd. (respondent No.8) cannot be considered as the same has been executed without permission of SIDCO i.e. the respondent No.2 and further in view of registered tripartite agreement between the petitioner, respondent No.2 and respondent No.8. There is nothing on record to prima facie establish the contention of the petitioner, as it is not forthcoming from record that the property sought to be auctioned was not "secured asset" as defined by section 2(zc) of SARFAESI Act. As such, the issue raised by the petitioner that the building is owned by the petitioner is a disputed question of fact that cannot adjudicated upon in the present writ petition. In City & Industrial Development Corpn. vs Dosu Aardeshir Bhiwandiwalla & Ors , (2009) 1 SCC , the supreme Court in paragraph 30 has held as under:

"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) 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 always are 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 remedy to which he is not otherwise entitled to in law."

18. In view of what has been said and discussed above, we are of the considered view that the present writ petition is misconceived and the same is required to be dismissed. Ordered accordingly.

19. Interim direction shall stand vacated.

(RAJESH SEKHRI)
JUDGE

(RAJNESH OSWAL)
JUDGE

Jammu
14.10.2022
Karam Chand/Secy.

Whether the order is speaking:	Yes/No.
Whether the order is reportable:	Yes/No.