

CASE NO.:
Appeal (civil) 5275 of 2007

PETITIONER:
Bijli Cotton Mill (Unit of National Textile Corporation U.P. Limited)

RESPONDENT:
U.P. Power Corporation Limited & Ors

DATE OF JUDGMENT: 16/11/2007

BENCH:
Dr. ARIJIT PASAYAT & LOKESHWAR SINGH PANTA

JUDGMENT:
J U D G M E N T

CIVIL APPEAL NO. 5275 OF 2007
(Arising out of S.L.P. (C) No. 20610 of 2006)

Dr. ARIJIT PASAYAT, J.

1. Leave granted.

2. Challenge in this appeal is to the judgment rendered by a Division Bench of the Allahabad High Court. The appellant-a unit of National Textile Corporation U.P. Limited (in short 'NTC') had moved the High Court for quashing the recovery proceedings. Further prayer was for direction to the respondents not to demand and/or recover any amount from the appellant.

3. Background facts as projected by the appellant are as follows:

The appellant unit was involved in the manufacture of Cotton yarn. The production in the unit stopped in the year 1992. Out of the 11 units which had become sick, nine could not be revived and only two could be revived. The appellant referred the matter of sickness of the mill to the BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985 (in short 'SICA'). The electricity connection of the mill was disconnected. A bill dated 15.11.2003 for a sum of Rs.33,52,251.18 towards principal and a sum of Rs.54,50,326.07 towards late payment surcharge (totalling to Rs.88,02,577.25) was raised.

4. Stand of the appellant was that the demand of late payment surcharge is contrary to the scheme approved on 5.2.2000 by the Board for Industrial and Financial Reconstruction (in short 'BIFR'). According to para 5.04 there was no scope for charging late payment surcharge because the scheme clearly provided for interest and damage. This plea was resisted by U.P. Corporation Ltd. It was the stand of the Corporation that there was no scope for writing off late payment surcharge and in any event, the same was not part of the approved scheme. The appellant had stated that the principal amount has been paid in full.

5. The appellant had pointed out that in the case of Lord Krishna Mills, another unit of NTC, the Corporation itself had taken a decision to write off late payment surcharge. That was

a part of the scheme and, therefore, a different yardstick should not have been applied.

6. Basic issue is whether the surcharge is included in the interest and damage as appearing in clause 5.04 of the approved scheme. The High Court relied on earlier decision in M/s L.M.L. Ltd., Kanpur v. State of U.P. and Ors. (AIR 2001 Allahabad 321) to negative appellant's stand.

7. The High Court was of the view that late payment surcharge was applicable. It held that there was provision for levy of late payment surcharge and so the amount was payable. It is not in the nature of penalty or compensation. This according to the High Court was the ratio in M/s L.M.L. case (supra). It was also noted by the High Court that the factual position in Lord Krishna Mill case was not clear and, therefore, even if some relief was granted to the said unit, that cannot be a ground to hold that late payment of surcharge was to be written off.

8. Learned counsel for the appellant submitted that admittedly no separate levy was made and, therefore, the question of waiver of interest does not arise. Additionally, it is submitted that in the case of Lord Krishna Mills case relief as has been claimed by the appellant was granted. The decision in M/s L.M.L. case (supra) has no application because the issue involved in that case related to surcharge on energy charges. There was no distinctive feature so far as Lord Krishna Mills case is concerned and, therefore, the High Court was not justified in refusing to grant relief.

9. Learned counsel for the Corporation supported the judgment of the High Court stating that late payment surcharge is different from interest or damage and, therefore, the same could not have been waived.

10. There is no doubt about the binding effect of the scheme. The approved scheme was circulated and relevant clauses 5.03 and 5.04 read as follows:

"5.03 \026 State Government (Uttar Pradesh)

i) To declare NTCUPL and its mills as Relief Undertaking for the purpose of granting reliefs concessions including sales tax, holiday deferment etc.

ii) To approve without any condition the sale of surplus land properties of NTCUPL and agree to conversion of its identified land into Commercial residential land use and sale thereof, exempting conversion charges and sales tax on sale of surplus machinery scrap subject to the master plan.

iii) To grant necessary clearances approvals pertaining to closure of unviable mills activity and to extend necessary support in this regard.

iv) To grant permission for sale of surplus leasehold freehold land identified at various units under Urban Land Ceiling Act (ULCA) and give exemption from payment of stamp duty thereof. The stamp duty would be paid by the purchaser of the land not by the company.

v) To waive the interest and damages on the electricity, water and municipal dues and accept payment of principal amount only during the year 2001-02.

vi) To exempt the company from payment of sales tax on the sale of scrap and other material rendered surplus.

"5.04 \026 Kanpur Electricity Board/State Electricity Board/State Government Power.

To writ off interest and damages in respect of arrears current dues of the company to Kanpur Electricity Board or to any other Electricity Authority in whose jurisdiction the mills were located.

i) To ensure to supply the electricity as required continuously, regularly during the period of rehabilitation."

11. It is to be noted that the High Court has not discussed as to why and in what manner Lord Krishna Mills' case was distinguishable on facts. The decision in M/s L.M.L. case (supra) has no application because the decision in that case related to surcharge on energy charges. If there was any doubt about the true effect of clauses 5.03 and 5.04 the matter could have been highlighted before the BIFR and could have been clarified. In fact, sub-sections (8) and (9) of Section 18 of SICR throw considerable light on the issue. They read as follows:

"18. Preparation and sanction of Schemes

xxx

xxx

xxx

(8) On and from the date of the coming into operation of the sanctioned scheme or any provision thereof, the scheme or such provision shall be binding on the sick industrial company and the transferee company or, as the case may be, the other company and also on the shareholders, creditors and guarantors and employees of the said companies.

(9) If any difficulty arises in giving effect to the provisions of the sanctioned scheme, the Board may, on the recommendation of the operating agency, [or otherwise], by order to anything, not inconsistent with such provisions, which appears to it to be necessary or expedient for the purpose of removing the difficulty."

xxx

xxx

xxx

12. The High Court has not referred to various stands taken and urged before it. Specific reference was made to Board's letter dated 18.6.2003 to Lord Krishna Textile Mill, and another letter dated 20.6.2003 in the context of waiver of delayed payment surcharge. Reference was also made to letter dated 7.9.2005 of the Corporation to the NTC that it has been decided to act as per decision taken in Lord Krishna Textile Mills. Reference was also made to letter dated 3.3.2003 of the Special Secretary, Government of Uttar Pradesh addressed to BIFR. In the circumstances, the matter is remitted to the High Court with the following directions:

(1) The BIFR shall be moved by the parties to clarify whether

delayed payment surcharge is included in interest or the damages in view of the conceded position that no interest was levied. The order of the BIFR shall be placed on record before the High Court. The parties shall move the BIFR within one month and BIFR is requested to pass necessary orders within two months thereafter.

(2) The effect of waiver in case of Lord Krishna Mills case shall be duly considered.

(3) The relevance of documents referred to above shall be duly considered.

13. The High Court is requested to consider the matter within four months of the receipt of the order of BIFR.

14. I.A. Nos.3 & 4 of 2006 have been filed by Anand Vrindaban (a partnership firm) for impleadment and directions. No order is necessary to be passed in those IAs, as it has no nexus with the issues involved in this appeal.

15. The appeal is allowed to the aforesaid extent with no order as to costs.