IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR
&
THE HONOURABLE MR. JUSTICE P.BHAVADASAN

TUESDAY, THE 1ST DECEMBER 2009 / 10TH AGRAHAYANA 1931

WP(C).No. 10950 of 2009(O)

PETITIONER(S):

THE MANAGING DIRECTOR,
KERALA STATE ROAD TRANSPORT CORPORATION,
THIRUVANANTHAPURAM,REPRESENTED BY LAW OFFICER
SRI.RANJITH JOSEPH.

BY ADV.MR.V.V.NANDAGOPAL NAMBIAR,SC, KSRTC

RESPONDENT(S):
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1. **UNION OF INDIA,**
   REPRESENTED BY MINISTRY OF LAW AND COMPANY AFFAIRS,
   NEW DELHI.

2. **M/S.SILPI INDUSTRIES,AROOR,**
   ALAPPUZHA.

R1 BY MR.T.P.M.IBRAHIM KHAN, ASST.SOLICITOR GENERAL
R2 BY MR.KURIAN GEORGE KANNANTHANAM, SENIOR ADVOCATE,
BY ADV.MR.TONY GEORGE KANNANTHANAM,
MR.THOMAS GEORGE.

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 01/12/2009 ALONG WITH WPC.NO.15481 OF 2009 AND CONNECTED CASES, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

Kss

WPC.NO.10950/2009 O

APPENDIX

PETITIONER'S EXHIBITS:

P1: COPY OF THE PURCHASE ORDER NO.SRA 5/26754/93 DTD. 05/02/1994.

P2: COPY OF THE AGREEMENT EXECUTED ON 10/02/1994.

P2(A): COPY OF THE STATEMENT REGARDING THE PURCHASE ORDERS PLACED BY THE CORPORATION LOSS SUSTAINED BY THE KSRTC.

P4: COPY OF THE ADDITIONAL STATEMENT OF ACCOUNTS SUBMITTED BY THE SECOND RESPONDENT DTD. 13/09/2007.

P5: COPY OF THE REPLY STATEMENT FILED BY THE SECOND RESPONDENT.

P6: COPY OF THE OBJECTION FILED BY THE KSRTC TO THE ADDITIONAL STATEMENT OF ACCOUNT.

P7: COPY OF THE AWARD DTD. 23/11/2007 IN O.A.NO.8/2006 PASSED BY THE KERALA MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL.

P8: COPY OF THE JUDGMENT IN WPC.NO.3956/2008 DTD. 31/03/2008.

P9: COPY OF THE AWARD DTED 26/06/2008 IN O.A.NO.8/2006 PASSED BY THE KERALA MICRO AND SMALL ENTERPRISES FACILITATION COUNCIL.

P10: COPY OF THE COMMON ORDER DTD. 17/12/2008 IN O.P.(ARBITRATION) NO.242/2008 OF THE DISTRICT JUDGE, THIRUVANANTHAPURAM.

RESPONDENT'S EXHIBITS: N I L

/TRUE COPY/

P.S.TO JUDGE

Kss

K. BALAKRISHNAN NAIR & P. BHAVADASAN, JJ.

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W.P.(C) Nos. 10950, 15481, 15643, 15758, 15759, 15760, 15854, 27185, 30201, 30212, 30351 & 30361 of 2009.

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Dated this the 1st day of December, 2009.

JUDGMENT

Balakrishnan Nair, J,

These writ petitions are filed by the Kerala State Road Transport Corporation, which is a statutory Corporation, formed under the Road Transport Corporations Act. These writ petitions are filed by it, mainly challenging Section 19 of the Micro, Small and Medium Enterprises Development Act, 2006 (Act No.27/2006), (herein after referred to as "the Act").

W.P.(C) No. 10950/2009

2. This writ petition is treated as the main case for the purpose of referring to the parties and exhibits. The Kerala Road Transport Corporation (for short "KSRTC") issued Ext.P1 purchase order dated 5.2.1994 to the second respondent for the supply of tread rubber for retreading tyres in its three major workshops. Ext.P2 dated 10.2.94 is one of

the agreements executed by the KSRTC with the second respondent for supply of tread rubber. According to the KSRTC, since the goods supplied did not conform to the specifications, it suffered loss. 90% of the amount payable under the purchase agreement has already been released to the second respondent. Only 10% of the amount was retained, when it was found that the materials supplied were substandard. While so, the second respondent filed O.A.8 of 2006 before the Industrial Facilitation Council, claiming amounts allegedly due to it. The petitioner KSRTC filed Ext.P3 objection. The Council, after hearing both sides and taking into account the rival claims, rejected the claim of the second respondent by Ext.P6 order. The said order was challenged before this Court, and this Court by Ext.P8 judgment, allowed the writ petition and directed the Council to take the O.A. back to file and dispose of the same, as provided under Section 18 of the aforementioned Act. Based on the said judgment, the matter

was reheard and the Council on 26.6.2008 passed Ext.P9 award in favour of the second respondent. Seeking to set aside Ext.P9, the petitioner filed O.P.(Arbitration) No.242 of 2008 before the District Court, Thiruvananthapuram, under Section 34 of the Arbitration and Conciliation Act, 1996. But, the said Original Petition was dismissed by the District Court, by Ext.P10 order taking the view that it was not maintainable for the failure of the KSRTC to make pre-deposit of 75% of the amount covered by the award, as provided under Section 19 of the Act. In the above background, this Writ Petition was filed, challenging Ext.P10 and also seeking a declaration that Section 19 of the Act is unconstitutional.

3. We heard the learned counsel Mr.K.Jayakumar and Sri.V.V.Nandagopal Nambiar for the writ petitioner KSRTC. For the first respondent, Union of India, we heard Assistant Solicitor General Mr.T.P.M. Ibrahim Khan. We also had the benefit of

hearing Sri.Kurian George Kannamthanam, Senior Counsel, on behalf of the second respondent.

4. The learned counsel for the petitioner submitted that Section 19 of the Act is arbitrary and discriminatory and therefore, violative of Article 14 of the Constitution of India. If any application to set aside an award is filed before a competent court, the buyer has to make pre-deposit of 75% of the amount due under the award. If the supplier is approaching, there is no such stipulation. So, the buyer and the supplier are treated differently and therefore, the impugned provision militates against the guarantee of equality contained in Article 14 of the Constitution of India. The learned counsel further submitted that the right to move the competent court under Section 34 of the Arbitration and Conciliation Act, 1996 is similar to the right to appeal provided under the unamended Section 17 of the Securitisation and Reconstruction of Financial Assets and Enforcement of Security

Interest Act, 2002 (hereinafter referred to as 'the SARFAESI Act'). So, in view of the decision of the Apex Court in **Mardia Chemicals Ltd. v. Union of India** ((2004) 4 SCC 311) the stipulation regarding pre-deposit has to be declared unenforceable. The learned counsel made special reference to paragraphs 55 to 64 of the said decision.

5. In answer, the learned Senior Counsel for the second respondent submitted that a seller or supplier approaches the competent court to set aside the award, if only his claim is rejected, and the party approaching against the rejection of the same need not make any pre-deposit. Further, it is pointed out that going by the ratio of the decision in **Mardia Chemicals Ltd.'s case,** contained in paragraph 64 thereof, it is manifestly clear that there is no similarity between an application filed by the KSRTC under Section 34 of the Arbitration and Conciliation Act, 1996 and a petition filed by a borrower under the unamended Section 17 of

the SARFAESI Act. So, the contentions of the petitioner are liable to the rejected, it is pointed out.

6. The learned Assistant Solicitor General submittd that no sustainable ground has been raised to strike down Section 19 of the Act.

7. The learned counsel for the petitioner pointed out that none of the respondents has filed any counter affidavit in the writ petition. When the constitutional validity of a statutory provision is challenged, the affidavits of the parties have practically no relevance. Even the affidavit of the Government does not have much relevance. No one holds the brief for the legislature, not even the Government. Once a legislation comes out of the Parliament House, it is for the court to decide whether that legislation is constitutional or not. In this context, it is apposite to quote the words of O.Chinnappa Reddy, J., who was speaking for the Constitution Bench in the decision reported in

Sanjeev Coke Manufacturing Co. v. M/s. Bharat Cocking Coal Ltd. (AIR 1983 SC 239):

> *"Shri Ashok Sen drew pointed attention to the earlier affidavits filed on behalf of Bharat Coking Coal Company and commented severally on the alleged contradictory reasons given therein for the exclusion of certain coke oven plants from the Coking Coal Mines (Nationalisation) Act. But, in the ultimate analysis, we are not really to concern ourselves with the hollowness or the self-condemnatory nature of the statements made in the affidavits filed by the respondents to justify and sustain the legislation. The depondents of the affidavits filed into court may speak for the parties on whose behalf they swear to the statements. They do not speak for the Parliament. No one may speak for the Parliament and Parliamnt is never before the Court. After Parliament has said what it intends to say, only the Court may say what the Parliament meant to say. None else. Once a statute leaves Parliament House, the Court's is the only authentic voice which may echo (interpret) the Parliament. This the Court will do with*

reference to the languge of the statute and other permissible aids. The executive Goverment may place before the Court their understanding of what Parliament has said or intended to say or what they think was Parliament's object and all the facts and circumstances which in their view led to the legislation. When they do so, they do not speak for Parliament. No Act of Parliament may be struck down because of the understading or misunderstanding of Parliamentary intention by the executive Government or because their (the Government's) spokesmen do not bring out relevant circumstances but indulge in empty and self-defeating affidavits. They do not and they cannot bind Parliament. Validity of legislation is not to be judged merely by affidavits filed on behalf of the State, but by all the relevant circumstances which the Court may ultimately find and more especially by what may be gathered from what the legislature has itself said. ....."

So, the absence of any affidavit from the contesting respondents will not improve the case of the petitioner.

8. Before dealing with the rival submissions on the validity of Section 19, we would briefly refer to the scheme of the Act. It is an Act to provide for facilitating promotion and development and for enhancing the competitiveness of micro, small and medium enterprises and for matters connected therewith or incidental thereto. Section 3 of the Act provides for the establishment of a National Board, consisting of high level Government functionaries including the Minister in charge of the Ministry of Department of the Central Government having administrative control of the micro, small and medium enterprises. The State Minister shall be the ex-officio Vice-Chairperson of the Board. Section 5 deals with the functions of the Board, which, inter alia, includes examination of the factors affecting promotion and development of micro, small and medium enterprises and review of policies and programmes of the Central Government in regard to facilitating promotion, development and enhancing

competitiveness of such enterprises and to make recommendations to the Central Government concerning the above matters. Chapter IV of the Act deals with the measures for promotion, development and enhancement of competitiveness of micro, small and medium enterprises. It deals with the measures for promotion and development, credit facilities, procurement preference policy etc. Chapter V, with which we are presently concerned, deals with delayed payments to micro and small enterprises. Section 15 says that a buyer shall make payment to the supplier for the goods or services rendered on or before the date agreed upon between them and the date agreed upon shall in no case exceed 45 days from the date of supply. Section 16 provides that if there is default from the part of the buyer, he is liable to pay interest at the rate, which will be thrice the bank rate notified by the Reserve Bank of India from time to time. Section 18 provides that the Facilitation Council constituted under Section 20 shall try to settle the dispute

between the supplier and the buyer amicably. If no settlement is arrived at after conciliation, the said Council can act as an Arbitrator or appoint some other Arbitrator to pass an award in the dispute between the buyer and the seller. Section 19 makes it mandatory to make pre-deposit of 75% of the amount due under an arbitration award, if the same is challenged under the provisions of the Arbitration and Conciliation Act, 1996. Section 19 reads as follows:

> ***"19. Application for setting aside decree, award or order.-*** *No application for setting aside any decree, award or other order made either by the Council itself or by any institution or centre providing alternate dispute resolution services to which a reference is made by the Council, shall be entertained by any Court unless the appellant (not being a supplier) has deposited with it seventy-five per cent of the amount in terms of the decree, award, or, as the case may be, the other order in the manner directed by such Court: Provided that pending disposal of the application to set*

> *aside the decree, award or order, the Court shall order that such percentage of the amount deposited shall be paid to the supplier, as it considers reasonable under the circumstances of the case subject to such conditions as it deems necessary to impose."*

Going by the above quoted provision, we find it difficult to accept the contention of the petitioner that the above provision is violative of Article 14 of the Constitution of India. The buyer and the seller are treated differently for valid reasons and grounds. A buyer, when challenges an adverse award, has to make pre-deposit. But, when a seller is non-suited, he need not make any pre-deposit for challenging the order, which is adverse to him. There is nothing wrong with it. If a defeated seller is called upon to make some deposit, it will appear irrational or arbitrary. So, the challenge made to the provision, on the ground that the same violates Article 14, is untenable.

9. The next point to be considered is whether the restriction imposed under Section 19, for invoking the remedy for setting aside an award is similar to the one provided under the unamended Section 17 of the SARFAESI Act and therefore, unreasonable. The unamended Section 17 of the SARFAESI Act reads as follows:

> *"17. Right to appeal.- (1) Any person (including borrower) aggrieved by any of the measures referred to in sub-section (4) of Section 13 taken by the secured creditor or his authorized officer under this chapter, may prefer an appeal to the Debts Recovery Tribunal having jurisdiction in the matter within forty-five days from the date on which such measure had been taken.*
>
> *(2) Where an appeal is preferred by a borrower, such appeal shall not be entertained by the Debts Recovery Tribunal unless the borrower has deposited with the Debts Recovery Tribunal seventy-five per cent of the amount claimed in the notice referred to in sub-section (2) of Section 13:*

Provided that the Debts Recovery Tribunal may, for reasons to be recorded in writing, waive or reduce the amount to be deposited under this section.

(3) Save as otherwise provided in this Act, the Debts Recovery Tribunal shall, as far as may be, dispose of the appeal in accordance with the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 (51 of 1993)and rules made thereunder."

Interpreting the said provision, the Apex Court in **Mardia Chemical Ltd.'s case** held as follows:

"60. The requirement of pre-deposit of any amount at the first instance of proceedings is not to be found in any of the decisions cited on behalf of the respondent. All these cases relate to appeals. The amount of deposit of 75% of the demand, at the initial proceeding itself sounds unreasonable and oppressive, more particularly when the secured assets/the management thereof along with the right to transfer such interest has been taken over by the secured

creditor or in some cases property is also sold. Requirement of deposit of such a heavy amount on the basis of a one-sided claim alone, cannot be said to be a reasonable condition at the first instance itself before start of adjudication of the dispute. Merely giving power to the Tribunal to waive or reduce the amount, does not cure the inherent infirmity leaning one sidedly in favour of the party, who, so far has alone been the party to decide the amount and the fact of default and classifying the dues as NPAs without participation/association of the borrower in the process. Such an onerous and oppressive condition should not be left operative in expectation of reasonable exercise of discretion by the authority concerned. Placed in a situation as indicated above, where it may not be possible for the borrower to raise any amount to make the deposit, his secured assets having already been taken possession of or sold, such a rider to approach the Tribunal at the first instance of proceedings, captioned as appeal, renders the remedy illusory and nugatory.

....

64. The condition of pre-deposit in the present case is bad rendering the remedy illusory on the grounds that: (i) it is imposed while approaching the adjudicating authority of the first instance, not in appeal, (ii) there is no determination of the amount due as yet, (iii) the secured assets or their management with transferable interest is already taken over and under control of the secured creditor, (iv) no special reason for double security in respect of an amount yet to be determined and settled, (v) 75% of the amount claimed by no means would be a meagre amount and (vi) it will leave the borrower in a position where it would not be possible for him to raise any funds to make deposit of 75% of the undetermined demand. Such conditions are not alone onerous and oppressive but also unreasonable and arbitrary. Therefore, in our view, sub-section (2) of Section 17 of the Act is unreasonable, arbitrary and violative of Article 14 of the Constitution."

The reasons given in paragraph 64 quoted above brings out the distinction between an appeal, as understood in the ordinary sense and the appeal provided under the unamended Section 17 of the SARFAESI Act. Those special grounds are not present in this case. Here, the Arbitrator passes an award in favour of the supplier. If the buyer wants to set aside that award, he has to make pre-deposit of 75% of the amount due under the award. We find similar provisions are there in several legislations and they have been upheld by the Apex Court in several decisions. Some of those decisions are **Anant Mills Co. Ltd. v. State of Gujarat** [(1975) 2 SCC 175], **Seth Nand Lal v. State of Haryana** (1980 Supp SCC 574), **Vijay Prakash D. Mehta v. Collector of Customs** (Preventive) [(1988) 4 SCC 402] and **Shyam Kishore v. Municipal Corporation of Delhi** [(1993) 1 SCC 22].

10. The Parliament could have said that an arbitration award passed under Section 18 is final and shall not be called in

question in any court of law. In that event, the possible remedy that may be open to the affected party is to file a writ petition under Article 226 of the Constitution of India. But, in this case, the Parliament has chosen to give a remedy subject to certain restrictions. It is settled position in law that none has any inherent right to file an appeal and no forum has any inherent power to entertain an appeal. The right to file appeal and the power to hear appeal are statutory creations and they have to be exercised subject to the limitations contained in the Statute creating the rights/conferring the powers. The legislature in its wisdom, while making provisions for the development of small scale industries, has provided that once the Arbitrator finds in favour of a small scale industry, if that award is to be challenged before the District Court under Section 34 of the Arbitration and Conciliation Act, a pre-deposit of 75% of the amount should be made. In the absence of such a provision for pre-deposit, the award could be executed

only after the proceedings before the District Court are over, by virtue of Section 36 of the Arbitration and Conciliation Act. So, this special provision for making deposit and also further empowering the court concerned to disburse the amount on valid grounds, has been incorporated in the Act to help the small scale industries. Every legislation will create some trouble for some persons, when it seeks to confer benefits on others. Such crudities and inequities are not available as grounds for challenging a legislation. The need for judicial restraint in dealing with a legislation of this nature has been extensively dealt with by the Apex Court in **R.K. Garg v. Union of India** ((1981) 4 SCC 675), wherein it was stated as follows:

> *"Another rule of equal importance is that laws relating to economic activities should be viewed with greater latitude than laws touching civil rights such as freedom of speech, religion etc. It has been said by no less a person than Holmes, K. that the legislature*

should be allowed some play in the joints, because it has to deal with complex problems which do not admit of solution through any doctrinaire or straitjacket formula and this is particularly true in case of legislation dealing with economic matters, where, having regard to the nature of the problems required to be dealt with, greater play in the joins has to be allowed to the legislature. The court should feel more inclined to give judicial deference to legislative judgment in the field of economic regulation than in other areas where fundamental human rights are involved. Nowhere has this admonition been more felicitously expressed than in Morey v. Doud where Frankfurter, J. said in his inimitable style:

'In the utilities, tax and economic regulation cases, there are good reasons for judicial self-restraint if not judicial deference to legislative judgment. The legislature after all has the affirmative responsibility. The courts have only the power to destroy, not to reconstruct. When these are added to the complexity of economic regulation, the uncertainty, the liability to error, the bewildering conflict of the experts and the number of times the judges have been overruled by events - self-limitation can be seen to be the path to judicial wisdom

and institutional prestige and stability.'

The court must always remember that 'legislation is directed to practical problems, that the economic mechanism is highly sensitive and complex, that many problems are singular and contingent, that laws are not abstract propositions and do not relate to abstract units and are not to be measured by abstract symmetry'; that exact wisdom and nice adaptation of remedy are not always possible' and that 'judgment is largely a prophecy based on meagre and uninterpreted experience'. Every legislation particularly in economic matters is essentially empiric and it is based on experimentation or what one may call trial and error method and therefore, it cannot provide for all possible situations or anticipate all possible abuses. There may be crudities and inequities in complicated experimental economic legislation but on that account alone, it cannot be struck down as invalid. the courts cannot, as pointed out by the United States Supreme Court in ***Secy. of Agriculture v. Central Roig Refining Co****. (94 L.Ed.381 338 US 604 (1949), be converted into tribunals for relief from such crudities and inequities.*

> *There may even be possibilities of abuse, but that too cannot of itself be a ground for invalidating the legislation, because it is not possible for any legislature to anticipate as if by some divine prescience, distortions and abuses of its legislation which may be made by those subject to its provisions and to provide against such distortions and abuses. Indeed, howsoever great may be the care bestowed on its framing, it is difficult to conceive of a legislation which is not capable of being abused by perverted human ingenuity. The court must, therefore, adjudge the constitutionality of such legislation by the generality of its provisions and not by its crudities or inequities or by the possibilities of abuse of any of its provisions. If any crudities, inequities or possibilities of abuse come to light, the legislature can always step in and enact suitable amendatory legislation. That is the essence of pragmatic approach which must guide and inspire the legislature in dealing with complex economic issues.".*

The Apex Court, recently, in the decision reported in **Government of A.P. v. P. Laxmi Devi** ((2008) 4 SCC 720) stated the necessity

for judicial deference to legislative judgment in economic matters. The relevant portion of the said judgment reads as follows:

> *"73. All decisions in the economic and social spheres are essentially ad hoc and experimental. Since economic matters are extremely complicated, this inevitably entails special treatment for special situations. The State must therefore be left with wide latitude in devising ways and means of fiscal or regulatory measures, and the court should not, unless compelled by the statute or by the Constitution, encroach into this field, or invalidate such law.*
>
> *74. As Frankfurter, J. of the US Supreme Court observed in American Federation of Labor v. American Sash and Door Co. (93 L ED 222)*
>
> *'Even where the social undesirability of a law may be convincingly urged, invalidation of the law by a court debilitates popular democratic Government. Most laws dealing with social and economic problems are matters of trial and error. That which before trial appears to be demonstrably bad may belie prophecy in actual operation. But even if a law is found wanting on trial, it is*

better that its defects should be demonstrated and removed by the legislature than that the law should be aborted by judicial fiat. Such an assertion of judicial power defeats responsibility from those on whom in a democratic society it ultimately rests. Hence rather than exercise judicial review courts should ordinarily allow legislatures to correct their own mistakes wherever possible.'

75. Similarly,. In his dissenting judgment in New State Ice Co. v. Liebmann (76 L Ed 747), Brandeis, J. the renowned Judge of the US Supreme Court observed that the Government must be left free to engage in social experiments. Progress in the social sciences, even as in the physical sciences, depends on a "process of trial and error" and courts must not interfere with necesary experiments.

76. In Secy. of Agriculture v. Central Roig Refining Co.(94 L Ed 381 Frankfurter, J. of the US Supreme Court observed:

'Congress was ... confronted with the formulation of policy perculiarly with its wide swath of discretion. It would be a singular intrusion of the judiciary into the legislative process to extrapolate restricitions upon

the formulation of such an economic policy from those deeply rooted notions of justice which the Due Process Clause expresses.'

77. However, though while considering economic or most other legislation the court gives great latitude to the legislature when adjudging its constitutionality, a very different approch has to be adopted by the court when the question of civil liberties and the fundamental rights under Part III of the Constitution arise.

....

80. ..... As regards economic and other regulatory legislation judicial restraint must be observed by the court and greater latitude must be given to the legislature while adjudging the constitutionality of the statute because the court does not consist of economic or administrative experts. It has no expertise in these matters, and in this age of specialisation when policies have to be laid down with great care after consulting the specialists in the field, it will be wholly unwise for the court to encroach into the domain of the executive or legisltive (sic legislature) and try to enforce its own views and perceptions."

9. Going by the above principles, we find that no ground has been made out, warranting interference with Section 19 of the Act.

In the result, the writ petition fails and it is, accordingly, dismissed.

W.P.(C) Nos.15481, 15643, 15758, 15759, 15760, 15854, 27185, 30201, 30212, 30351 & 30361 of 2009.

In view of the judgment in W.P.(C) No.10950/2009, these writ petitions are also dismissed.

K. Balakrishnan Nair,
Judge

P. Bhavadasan,
Judge

sb.