

H.C. Arora Vs State of Punjab and Others

Court: High Court Of Punjab And Haryana At Chandigarh

Date of Decision: Oct. 9, 2009

Acts Referred: Prevention of Corruption Act, 1988 â€” Section 2(c)

Citation: (2009) 156 PLR 721

Hon'ble Judges: Tirath Singh Thakur, C.J; Kanwaljit Singh Ahluwalia, J

Bench: Division Bench

Judgement

T.S. Thakur, C.J.

Punjab State Electricity Board, Patiala (hereinafter referred to as, "the Board") in 2005-06 raised a loan of Rs. 300.00

crores for executing infrastructure development works. Instead of obtaining this loan directly from the Banks, the same was raised through an

arranger after paying commission of Rs. 1.62 crores, allegedly in connivance with the officials of Punjab National Bank (hereinafter referred to as,

"the Bank"). A huge pecuniary loss was thus caused to the Government establishment, which was avoidable, especially when the financial deal was

between a State Public Sector Undertaking and a nationalized Bank.

2. Whether a middleman, called "Loan Arranger", and payment of the commission, was required or not? Whether Rs. 1.62 crores, the amount of

commission was a booty shared by the employees of the Bank and the Board ? Whether the employees of the Bank and the Board, for their acts

of omission and commission, are liable to be prosecuted for criminal misconduct, having taken advantage of their official position and whether it

can be presumed that they have enriched themselves and committed an offence under the provisions of the Prevention of Corruption Act, 1988 ?

Whether such a financial transaction adheres to the norms of transparency, accountability, regulations and instructions of the Reserve Bank of India

? are various questions posed in the present writ petition. All these issues are important, specially the context that a few days before the deal was

finalized towards the end of August, 2005, the Bank had refused to process the request of the Board, but when a Loan Arranger was associated,

the loan was cleared immediately.

3. Time now to state a few facts:

4. Chief Engineer (Planning), Punjab State Electricity Board, Patiala on 7th April, 2005 prepared an estimate of the Board's financial requirement

and assessed the same as Rs. 955.75 crores for executing various schemes and projects. General Manager (Finance), Punjab State Electricity

Board, Patiala made a proposal for raising Rs. 919.26 crores from internal sources and the deficit to be tapped from external sources by raising

loans. For raising a loan, a Committee was constituted under the chairmanship of Chairman of the Board, Member (Finance and Accounts),

Administrative Member and General Manager (Finance). The Committee noted the need of Rs. 250.00 crores and decided to raise a loan, as

finance for balance of the requirement was already tied up with Power Finance Corporation, Rural Electrification Corporation & Govt. of India

(APDRP). The Committee decided to approach Commercial Banks and Arrangers for raising long term loan of about Rs. 250.00 crores for

funding the Board's on going generation projects and T&D schemes. In a meeting held on 20th July, 2005, the terms of loan were also specified.

It was noted that the loan was required for a period of ten years with a moratorium period of three years. The Board also agreed to offer Escrow

Cover as payment security to the Lender by entering into Tripartite Agreement between the Lender, State Bank of Patiala (the Board's main

Banker) and the Board.

5. The Arrangers were to be approached for raising Non-SLR Bonds of Rs. 250.00 crores indicating therein that (i) the funds are required for its

ongoing generation projects and T&D schemes, (ii) the Bonds shall be for a period of ten years with a put and call option after seven years.

6. The Arrangers were also called upon to indicate the rate of interest, at which Bonds can be raised, along with broad terms and conditions and

Arrangers' fee for the following options:

(a) Bonds with Govt. guarantee and rating;

(b) Bonds without Govt. guarantee and with rating; and

(c) Bonds without Govt. guarantee and without rating.

7. The minutes of the meeting have been attached as Annexure R-3/1. A perusal of these minutes reveals that for the long term loan, Commercial

Banks were to be approached and for raising funds through Non-SLR Bonds, Arrangers were to be involved. Letters were issued to 30 Banks

and 9 Arrangers. They were requested to divulge their terms and conditions and the rate of interest on or before 16th August, 2005. Up to 16th

August, 2005, three nationalized Banks, Bank of India, Union Bank of India and Oriental Bank of Commerce, along with eight Arrangers, had

submitted their proposals. Punjab National Bank, UCO Bank and Dena Bank sought extension of time up to 22nd August, 2005. The above said

three Banks had offered term loans at the annualized interest cost of 8.57 per cent. The Committee held its meeting on 22nd August, 2005. It

decided not to pursue the offer of Life Insurance Corporation for providing long term loan of Rs. 175.00 crores at the annualized interest cost of

8.95 per cent. The option of raising Non-SLR Bonds was also dropped.

8. It will be pertinent to mention here that on 23rd August, 2005, vide Annexure R-3/2 Chief Manager of the Bank (Punjab National Bank) stated

that they have not received any sanction from the higher authorities in respect of quoting terms and conditions for the loan, therefore the Bank

expressed its inability to quote any rate of interest or any terms and conditions for the loan of Rs. 250.00 crores. In the meeting held on 23rd

August, 2005, it was decided to appoint five Arrangers, namely (i) Allianz Securities Ltd., (ii) A.K. Capital Services Ltd., (iii) R.R. Financial

Consultants Ltd., (iv) SPA Merchant Bankers Ltd. and (v) Centrum Capital Ltd. In the meeting held by the Committee on 12th September, 2005,

three Arrangers, namely (i) SPA Merchant Bankers Ltd., (ii) Centrum Capital Ltd. and (iii) A.K. Capital Services Ltd. were selected. It was also

decided that instead of raising loan of Rs. 250.00 crores, the loan amount be raised to Rs. 300.00 crores. The three Arrangers distributed the

Banks amongst themselves, who were to be approached. The following table depicts, which Banks were to be approached by a particular Loan

Arraneer:

M/s A.K. Capital M/s Centrum M/s SPA Merchants

Punjab National Bank, Bank of India, UCO Bank

Central Bank of India Union Bank of India Allahabad Bank

Dena Bank Canara Bank Syndicate Bank

Corporation Bank Bank of Baroda Oriental Bank of Commerce

Vijaya Bank Bank of Maharashtra Indian Overseas Bank

IDBI Bank Bank of Rajasthan Andhra Bank

United Western Bank J&K Bank United Bank of India

Karur Vyaja Bank Punjab & Sind Bank State Bank of Patiala

NCRPB, New Delhi

HUDCO

9. The Arrangers had divided various Banks amongst themselves on 17th September, 2005 and they approached the Banks on 19th, 20th and

22nd September, 2005. It is surprising that the Punjab National Bank, which earlier was not willing to respond to the request of the Board, when

Loan Arranger became active, between 19th to 20th September, 2005, immediately agreed to sanction the loan of Rs. 300.00 crores to the Board

at a low interest rate of 7.16 per cent per annum.

10. A.K. Capital Services Ltd., Loan Arranger, who proclaim themselves to be Merchant Bankers (as per Securities and Exchange Board of

India guidelines of September 26, 2005), wrote a letter to the General Manager of the Board that the Bank has agreed to disburse the funds. The

letter was accompanied by another letter dated 24th September, 2005 issued by the Chief Manager, Punjab National Bank, The Mall, Patiala.

These documents have been annexed with the written statement filed by the Board as Annexure R-3/5. The letter issued by the Chief Manager on

24th September, 2005 calls upon the General Manager (Finance) of the Board to complete the documents so that the loan can be disbursed at an

early date. On the loan of Rs. 300.00 crores, the Arranger received a commission at the rate of 0.49 per cent, which amounted to Rs. 1.62 crores.

11. Whether the agreement of the Board to give 0.49 per cent commission to the Loan Arranger, was a Magical Wand, which lead to sanction of

the loan within 72 hours, for which the Bank had earlier refused ?

12. The matter would have remained under the carpet and would not have surfaced, if for compliance of statutory requirements, in March 2008, in

the Session of Punjab Legislative Assembly, on the floor of Vidhan Sabha, the report of Comptroller and Auditor General of India (Commercial)

had not been laid. The said report has been annexed with the writ petition as Annexure P-I and the same reads as under:

The Board constituted (September 2004) a committee comprising Chairman; Member (Finance & Accounts), Administrative Member and

General Manager (Finance) to decide whether the funding for its projects during 2004-05 should be mobilized directly from the banks or through

arrangers. The committee opted (October 2004) funding from the banks. Accordingly, the Board, after inviting offers (January 2005) from various

banks availed loan of Rs. 200 crore directly from the Oriental Bank of Commerce (OBC), Patiala at 7.25 per cent per annum interest from

January 2005 with the revision of rate after every three years.

Audit scrutiny revealed, that, for requirement of Rs. 250 crore during 2005-06, the Board did not stick to its earlier decision of arranging funds

directly from the banks and decided (July 2005) to approach both commercial banks as well as the arrangers to mobilize funds. Accordingly, the

Board approached (July 2005) 30 banks and nine arrangers for submitting their offers by 16 August 2005. The offers of six banks and eight

arrangers received were opened on the same day. It was found that three banks (including Punjab National Bank (PNB)) had requested the Board

for extension in time up to 20/22 August 2005 as the proposal was under consideration of their head office. The Board agreed to the requests, but,

none of the three banks submitted any offer up to 22 August 2005. The Board evaluated the offers of other three banks and arrangers and found

that lowest annualised cost was 8.57 per cent and 6.77 per cent in respect of banks and arrangers respectively. After negotiations, the Board

asked (September 2005) three arrangers to arrange long term loan of Rs. 300 crore by 30 November 2005 at lowest offered interest rate of 7.16

per cent with monthly rests (7.40 per cent annualised cost), with the condition to reset the interest rate after five years at arranger's fee of 0.49 per

cent plus service tax The offer (September 2005) of one arranger (A.K. Capital Services Limited) for arranging the term loan of Rs. 300 crore at

7.16 per cent payable monthly from PNB was accepted (September 2005) by the Board. The entire term loan was availed by the Board by 9

January 2006 and arrangers fee of Rs. 1.62 crore was paid (26 December 2005) to A.K. Capital Services Limited.

As the Board had already obtained (January 2005) loan directly from OBC on the similar terms and conditions during previous year without any

payment to the middleman, the Board should have resorted to the same practice during 2005-06 also and especially when the arrangers had

clearly indicated during negotiations (23 August 2005) that, the loan would be arranged by them through commercial banks. Non mobilization of

funds directly from the banks resulted in avoidable payment of arrangers fee of Rs. 1.62 crore.

The Management/Government stated (June/ August 2007) that the case was kept pending up to 22 August 2005, but, the banks showed their

inability to give offers. The reply is not tenable because the Board did not approach the head office of the bank and considering the huge loan

amount of Rs. 300 crore, the Board should have approached the head office of the bank (PNB) instead of local branch office for prompt sanction

of loan. Moreover, it was clear to the Board that the arrangers would arrange funds through the banks and so the Board should have taken up the

matter with the banks even after 22 August 2005.

13. The report highlights two things. First, in January 2005, the Board had availed loan of Rs. 200.00 crores directly from Oriental Bank of

Commerce at the rate of 7.25 per cent per annum. Secondly, higher rates of interest were quoted by various other Banks. Punjab National Bank

was not willing to participate in the disbursement of the loan amount.

14. This financial malfeasance/ malpractice, when came to light, led Mr. H.C. Arora, an Advocate of this Court to file the present Public Interest

Litigation with a prayer that a direction be issued to the Chief Secretary, Punjab and Punjab Vigilance Bureau to take action under the Criminal

Law against the guilty officers of the Board, as public money to the tune of Rs. 1.62 crores has been wasted by paying middleman fee.

15. This Court had taken cognizance and called for the response of the respondents. Respondent No. 3 Punjab State Electricity Board, in its

counter affidavit, stated that the Board takes decision as per needs. The very fact that in February 2005, Arrangers were not involved for raising

loan, was not a general policy decision but, subject to requirements, taking into consideration the prevailing situation, the decision was subject to

change. The relevant para of the counter affidavit reads as under:

In respect of the above observations it is submitted that for deciding on the mode of mobilization of resources the Board takes a decision each year

as per requirement and in view of the then prevailing situation. There is no general decision of the Board to go through Arrangers or to approach

the Commercial Banks directly.

16. Secondly, it has been stated that various other Public Sector Undertakings belonging to the different States have also raised loan by involving

Merchant Bankers. To justify this, the table has been reproduced in para 4 (v). From the table reproduced in the counter affidavit, it is apparent

that only in a few cases for raising a term loan from nationalized Banks, Arrangers were involved. The correspondence attached when read,

revealed that the rate of commission was very low.

17. We have heard Mr. H.C. Arora, petitioner appearing in person, Mr. Rupinder Khosla, Additional Advocate General Punjab for the State and

Vigilance Bureau, Mr. H.S. Sidhu, Advocate for the Punjab State Electricity Board and Mr. H.S. Bansal, Advocate for newly impleaded

respondent Punjab National Bank.

18. Mr. Arora stated that the Board has separate Branch to raise loans, under the leadership of Advisor (Finance), Punjab State Electricity Board,

Patiala, which consists of 13 officials including the Advisor. He has relied upon a document of the Board, which give details of officers and nature

of their duties and functions. The duties of the Advisor (Finance) include preparation of budget, to tie-up resources, arranging loans from financial

institutions and Government and its servicing. Deputy Financial Advisor -I and Accounts Officer (Loans), another two officers have also been

assigned duty of arranging loans from various financial institutions and Government and its servicing. It is stated that the Board has employed

various persons for this purpose, yet Loan Arranger was engaged for arranging the loan by paying commission. As in the present case, Rs. 1.62

crores were paid for obtaining loan from a nationalized Bank. Mr. Arora has further submitted that in February 2005, the Board had decided not

to obtain any loan through Arranger. In February, 2005 loan was obtained from Oriental Bank of Commerce and no Arranger fee was paid.

Suddenly, in August, 2005, the Board decided to involve the Arrangers and explored raising the amount through SLR Bonds (a window opened

for Arrangers to make an entry). Punjab National Bank earlier had not processed the request of loan made by the Board in the last week of

August 2005.

19. Arranger approached the Bank between 19th to 22nd September, 2005 and on 24th September, 2005, the loan was sanctioned and the rate

of interest had fallen from 8.50 per cent to 7.16 per cent per annum. How this miracle happened ? Whether the amount of commission had added

grease to the unmoving wheels, and thereafter they moved with a lightening speed ? The distance between Punjab National Bank, The Mall, Patiala

and head office of Punjab State Electricity Board, The Mall, Patiala is few meters.

20. Mr. Rupinder Khosla, Additional Advocate General, Punjab stated that the matter has been thoroughly investigated and the Chief Director,

Vigilance Bureau is of the view that no criminal liability can be fastened upon the Board officials. Mr. H.S. Sidhu appearing for the Board has

justified the demand of commission by Loan Arranger, saying that it is a prevailing practice with various other Government Undertakings in other

States and by engaging an Arranger, the Board has been able to save Rs. 20.00 crores, as when the Board approached the Banks directly, higher

rate of interest was quoted by the Banks. He further contended that the Loan Arrangers were invited in the best interest of the Board and

therefore, decision of the officials of the Board cannot be doubted.

21. Mr. H.S. Bansal, Advocate appearing for the Bank has stated that the Bank is not aware of any payment to Arranger as no process fee/legal

fee was charged from the Board.

22. The Superintendent of Police, Economic Offences Wing, Unit-V, Vigilance Bureau, Punjab had recorded the statement of Deepak Mittal,

Director of A.K. Capital Services, wherein he stated that A.K. Capital Services is a Semi-registered Category -I Merchant Banker and perform

the functions of arranging funds through term loans and bonds for various Public Sector Undertakings.

23. Merchant Banker has been defined under the Securities & Exchange Board of India (Merchant Bankers) Rules, 1992 as ""any person who is

engaged in the business of issue management either by making arrangements regarding selling, buying or subscribing to securities as manager,

consultant, advisor or rendering corporate advisory service in relation to such issue management"".

24. The Reserve Bank of India issues Bonds known as Government of India Securities (G-Secs) on behalf of Government of India, State

Government and its instrumentalities. G-Secs are issued to the market through an auction. It involves expertise of a Merchant Banker.

25. Securities as SLR bonds, as specified by the Reserve Bank of India, are eligible securities for investment by the Banks to meet SLR

commitment. Statutory Liquidity Ratio (SLR) refers to the amount that all Banks require to maintain in cash or in the form of Gold or approved

securities.

26. Public Sector Undertaking bonds, as the name suggests, are floated by Public Sector Undertakings. Investment Bankers or Merchant Bankers

are roped in as Arrangers to the issue of SLR Bonds or Non SLR Bonds. Public Sector Undertaking bonds are issued in demat form. In order to

attract the investors and increase liquidity, these bonds are required to be marketed by devising acceptable projections by the Merchant Bankers.

27. Merchant Bankers or Arrangers are required, if funds are to be raised through public issue in the form of equity, debentures or bonds. They

are also needed if funds are to be raised through Govt. securities or floating of issue of SLR, Non-SLR bonds. The term loan is to be evaluated by

the Bank. Nationalized commercial Banks, for evaluating term loan, do not require services of a Merchant Banker or Loan Arranger.

28. In the present case, the Board had decided not to go for Non- SLR Bonds. No Government securities (G-Secs) were to be auctioned. No

expertise of Arranger was required. It was a simple financial deal between an undertaking of the Government and a nationalized Bank, which is

also called Public Sector Undertaking.

29. It is nowhere the case of the respondents that within four days, Loan Arranger had prepared any financial papers/documents, given projections

regarding the requirement of the Board or have used their skills for demonstrating financial viability and strength of the borrower. It is only sharing

of the commission, which brought the change. Reserve Bank of India instructions also recognize Arrangers only for raising loan from overseas, but

not for a commercial dealing between two Public Sector Undertakings. The respondents intend to justify this by giving example of other Public

Sector Undertakings, who have parted heavy amount as commission to the Arrangers. This leakage, which is unlawful in the financial system, is

required to be plugged.

30. The petitioner has impleaded Punjab Vigilance Bureau as respondent No. 2. On 14th January, 2009, short affidavit was filed by the Deputy

Superintendent of Police, Flying Squad-1, Unit-V, Vigilance Bureau, Punjab stating therein that a case has been registered bearing Complaint No.

4/09 at Patiala against the Board and time is required to verify the contents of the complaint. Another affidavit dated 27th March, 2009 was

submitted in this Court seeking extension of time to conclude the proceedings in the above said complaint. Final report of the investigation carried

by Mr. I.S. Randhawa, Superintendent of Police, Economic Offences Wing, Unit-V, Vigilance Bureau, Punjab has been handed over to us. The

Superintendent of Police (Vigilance), Punjab, in his report dated 15th June, 2009, arrived at a conclusion, which when translated reads as under:

From the above said, it is apparent that there is a connivance between nationalized Bank and Arrangers. Whenever Government undertaking

directly approaches nationalized Bank, as was done in the present case, high rate of interest is given or intentionally delay is caused in giving the

rates, whereas when the Department obtains loan through Arrangers, the loan is immediately sanctioned. Therefore, there is collusion between

nationalized Bank and Arrangers and in this manner Arrangers after getting their fee, are causing loss of crores of rupees to the Government. Thus,

legal action is required to be taken against officials of the Bank and Arranger.

31. On 7th July, 2009, the Chief Director, Vigilance Bureau Punjab, Chandigarh opined that after going through the report of the Inquiry Officer,

no criminal liability has been found and departmental action is required to be taken, therefore the inquiry report along with all record was sent to

the Principal Secretary (Power) for further action, with the request that further action taken be intimated to the Vigilance Bureau.

32. To sum-up, (a) in February 2005, when loan of Rs. 200 crores was arranged from Oriental Bank of Commerce, no Loan Arranger was

involved and no commission was paid. (b) Loan Arranger was introduced on the pretext of raising loan through Non-SLR Bonds. The option of

Non- SLR Bonds was dropped, but Loan Arrangers were retained. (c) Punjab National Bank, The Mall, Patiala had refused to consider the

proposal of the Punjab State Electricity Board, The Mall, Patiala on 22nd August, 2005. The Board had made no effort to approach directly, any

other Bank or Head Office of Punjab National Bank. (d) Punjab National Bank, The Mall, Patiala and the Board are situated in a close vicinity.

The various persons employed for arranging the loan, who were drawing monthly salary, had made no effort to approach and contact Bank

authorities. (e) Loan Arranger approached the Bank between 19th to 22nd September, 2005 and the same Branch, which had earlier refused to

entertain the proposal of the Board, sanctioned the loan on 24th September, 2005. AH this happened within 72 hours.

(f) There are no regulations

or instructions of Reserve Bank of India, recognizing Loan Arranger for grant of loan by a nationalized Bank to a Public Sector Undertaking. (g) In

the present case, loan was not to be raised from overseas. No foreign currency was required for facilitating any kind of import. (h) There is in-

house mechanism available in the nationalized Banks to evaluate the loan proposal, assess the credibility of the borrower and viability of

repayment. Therefore, no expertise of any Merchant Banker (Loan Arranger) was required. (i) Loan Arrangers, who claim themselves to be

Merchant Bankers, are only required if the loan is to be raised in the form of securities by floating issue of equity, debentures or bonds or in case of

Govt. securities or SLR bonds. For a term loan, Loan Arranger is not recognized in the financial system. (j) The payment of Rs. 1.62 crores to a

middleman for obtaining a term loan is not in consonance with any established practice and mode prevailing in the financial world. (k) The

Superintendent of Police, Economic Offences Wing, Unit V, Vigilance Bureau, Punjab has recommended initiation of legal action.

33. There are many question marks regarding transparency, accountability of the present deal, whereby commission was paid. There are various

circumstances, which raise needle of suspicion and it can be presumed that role of the officials of the Board and the Bank is not aboveboard.

Otherwise also, it cannot be digested that two instrumentalities of the Govt., for transecting business between them, require any intermediatery,

which cause drain on public exchequer and thereby money of the tax payer is robbed.

34. We are of the view that officials of the Bank and the Board are public servants within the meaning of Section 2(c) of the Prevention of

Corruption Act, 1988. Therefore, there is need to enquire whether the payment of commission amounting to Rs. 1.62 crores to a Loan Arranger

amounts to criminal misconduct on the part of the public servants, who were engaged in this deal. The Bank employees are Central Govt.

employees and serious misconduct on their part as public servants can only be enquired by the Central Bureau of Investigation (CBI).

35. In view of the observations made above, we dispose of the present writ petition by giving following directions:

(a) The Director, CBI shall order registration of preliminary enquiry to enquire into the allegations of criminal misconduct on the part of the public

servants, who include Bank officials and officials of the Board. The enquiry may be assigned by the Director, CBI to any officer of the rank of Joint

Director or the DIG, with expertise in investigating banking, commercial and financial frauds. In case, the preliminary enquiry reveals the

commission of a cognizable offence, a regular case be registered and investigated, and thereafter, taken to its logical conclusion;

(b) The Reserve Bank of India is one of the watch-dogs of finance and economy of the nation. It ought to be aware of the alleged prevailing

practice of payment of commission to Loan Arrangers for obtaining a term loan from a nationalized Bank by a Public Sector Undertaking. We

request the Reserve Bank of India to consider and if necessary, evolve a mechanism to curb such payments to the Loan Arrangers and introduce

necessary safeguards to plug the loopholes and leakage of funds, which have been garnered by the Public Sector Undertakings from its consumers

or the tax payer.