

(2008) 11 CAL CK 0069

In the Calcutta High Court

Case No : G.A. No's. 2325 and 2832 of 2008, A.P.O.T. No. 406 of 2007 and W.P. No. 1735 of 2002

Ganpat Lal Pawan Kumar and Another

APPELLANT

Vs

Uttar Pradesh State Spinning Co. Ltd. and Others

RESPONDENT

Date of Decision : 04-11-2008

Acts Referred:

Limitation Act, 1963 — Section 18, 8
Revenue Recovery Act, 1890 — Section 5A

Citation : (2009) 2 CALLT 49 : (2008) 4 CHN 694 : (2009) 1 ILR (Cal) 263

Hon'ble Judges : Rudrendra Nath Banerjee, J; Bhaskar Bhattacharya, J

Bench : Division Bench

Advocate : A.K. Mitra, Utpal Bose, D. Basak, D.N. Sharma, A. Ray and R.K. Rai, for the Appellant; Pratap Chatterjee, Saptangsu Basu and A. Banerjee, for the Respondent

Final Decision : Dismissed

Judgement

Bhaskar Bhattacharya, J.—This mandamus appeal is at the instance of the unsuccessful writ petitioners and is directed against order dated July 13, 2007, passed by a learned Single Judge of this Court by which His Lordship dismissed the said writ application on merit.

2. Being dissatisfied, the writ petitioners have come up with the present mandamus appeal.

3. The case made out by the appellants in the writ application out of which the present mandamus appeal arises may be summed up thus:

1) The appellant No. 1 is a partnership firm duly registered under the Indian Partnership Act and carrying on business at the address given in the cause-title of the application. The appellant No. 2 carries on business through the agency and/or instrumentality of the appellant No. 1 from Kolkata. In its usual course of business, the appellant No. 1 was associated with the respondent No. 1 and had

business relationship with the respondent No. 1 as a dealer, distributor or consignment agent for the period of last 29 years.

2) In terms of the said agreement, the appellants had caused the respondent No. 3, the banker of the appellants, to issue a bank guarantee in favour of the respondent No. 1 for a sum of rupees five lakh. The said bank guarantee was extended from time to time at the instance of the appellants by the respondent No. 3.

3) The respondent No. 1 by letters dated June 7, 2002 and July 9, 2002 demanded a sum of Rs. 44.99 lakh from the appellants which was without any basis. The respondent No. 1, in demanding such amount, had not taken into account the amount owed by the respondent No. 1 to the appellants.

4) By a letter dated July 11, 2002, the appellants had placed on record the correct facts regarding the transaction between the parties. It was pointed out to the respondent No. 1 by the said letter that after the adjustment of the claim of the respondent No. 1 against the appellants, and taking into account the amount payable by the respondent No. 1 to the appellants, a sum of Rs. 7,19,576.80p. became due and payable by the respondent No. 1 to the appellants.

5) Apprehending that the respondent No. 1 would invoke the bank guarantee furnished by the appellants, by a letter dated July 12, 2002, the appellants intimated the respondent No. 3 that such invocation would be a fraudulent one and that the respondent No. 3 should not permit encashment of the bank-guarantee without reference to the appellants.

6) The respondent No. 1 invoked the said bank-guarantee by a letter dated July 15, 2002. The agreement dated July 2, 1997 between the parties contained an arbitration agreement between the appellants and the respondent No. 1 but the said agreement was not binding upon the appellants and in any event, had no relation with the disputes involved in the writ application. Moreover, the respondent No. 3 is not a party to the purported arbitration agreement.

7) In the above circumstances, the appellant had filed a suit in the Original Side of this High Court being Civil Suit No. 347 of 2002 thereby praying for recovery of Rs. 7,19,576.80p. with other consequential relief and the said suit is still pending.

8) Subsequent to the filing of the said suit, on or about August 3, 2002, the appellants were surprised to receive a notice of a caveat lodged on behalf of respondent No. 1 and from the said the notice, the appellants for the first time came to learn that the respondent No. 1 had invoked the provision of Uttar Pradesh Public Moneys (Recovery of Dues) Act, 1972, for realization of its alleged claim against the appellants by issue of certificate.

9) The purported certificate alleged to have been issued under the provision of the said Act of 1972 was non est, null and void and was not binding upon the appellants. None of the respondents was entitled to enforce the purported

certificate against the appellants or any of them. The said certificate had been issued in breach of the principle of natural justice and no hearing had been afforded to the appellants before the initiation of the purported recovery proceeding.

4. The appellants, thus, *inter alia*, prayed for a writ in the nature of prohibition restraining the respondents from giving any effect or further effect to the said recovery proceedings.

5. The aforesaid writ application was opposed by the respondent No. 1 by filing affidavit-in-opposition thereby justifying its action in initiating the recovery proceeding under the provisions of the Act of 1972. It was specifically alleged that there was existence of an arbitration agreement between the parties and if the appellants wanted to dispute the claim of the respondent No. 1, they were free to resort to the said arbitration proceeding. All the questions of law raised by the appellants were specifically disputed in the said affidavit-in-opposition.

6. The learned Single Judge, as pointed out earlier, by the order impugned herein turned down all the questions of law raised by the appellants and consequently, dismissed the said writ application.

7. Being dissatisfied, the unsuccessful writ petitioners have come up with the present mandamus appeal.

8. After going through the order impugned, we find that the appellants raised the following three questions before the learned Single Judge:

1) The alleged due, having accrued out of the business transaction carried on by the parties in Kolkata, was not recoverable through the proceedings initiated under the Act of 1972 which extended only to the State of Uttar Pradesh.

2) Even if the proceedings under the said Act could be initiated for the transactions taken place outside the State of Uttar Pradesh, the proceedings, impugned in the writ application for recovery of the alleged due arising out of pure business transaction, were not maintainable because the proceedings under the Act could be started only for realisation of the money given as advance or loan by the respondent No. 1.

3) The proceedings under the Act could not be initiated without giving the alleged debtor an opportunity of hearing which is an inbuilt concept of the provision of Section 3 of the Act of 1972.

9. All the aforesaid three questions were reargued on behalf of the appellants and in addition to the aforesaid points, a new point was taken that the certificate sought to be enforced in this case was not issued in accordance with the provisions contained in the Uttar Pradesh Amendment of the Revenue Recovery Act, 1890.

10. Therefore, the first question that falls for determination in this appeal is whether the provisions of the Act of 1972 can be invoked for the purpose of

realisation of the alleged dues arising out of the transactions taken place beyond the territorial limit of the State of Uttar Pradesh.

11. In order to deal with the points raised in this appeal it will be profitable to refer to the provisions contained in Section 3 of the Act of 1972 which are quoted below:

3. Recovery of certain dues as arrears of land revenue.:

(1) Where any person is a party:

(a) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire purchase of goods sold to him, by the State Government or the Corporation, by way of financial assistance, or

(b) to any agreement relating to a loan, advance or grant given to him or relating to credit in respect of, or relating to hire-purchase of goods sold to him, by a banking company or a Government company, as the case may be, under a State sponsored scheme; or

(c) to any agreement relating to a guarantee given by the State Government or the Corporation in respect of a loan raised by an industrial concern; or

(d) to any agreement providing that any money payable thereunder to the State Government or the Corporation shall be recoverable as arrears of land revenue; and such person:

(i) makes any default in repayment of the loan or advance or any instalment thereof; or

(ii) having become liable under the conditions of the grant to refund the grant or any portion thereof makes any default in the refund of such grant or portion or any instalment thereof; or

(iii) otherwise fails to comply with the terms of agreement,

then, in the case of the State Government, such officer as may be authorised in that behalf by the State Government by notification in the Official Gazette and in the case of Corporation or a Government company the Managing Director or where there is no Managing Director then the Chairman of the Corporation, by whatever name called or such officer of the Corporation or Government Company, as may be authorised in that behalf by the Managing Director or the Chairman thereof, and in the case of a banking company, the local agent thereof, by whatever name called, may send a certificate to the Collector, mentioning the sum due from such person and requesting that such sum together with costs of the proceedings be recovered as if it were an arrear of land revenue.

(2) The Collector on receiving the certificate shall proceed to recover the amount stated therein as an arrear of land revenue.

(3) No suit for the recovery of any sum due as aforesaid shall lie in the Civil

Court against any person referred to in Sub-section (1).

(4) In the case of any agreement referred to in Sub-section (1) between any person referred to in that sub-section and the State Government or the Corporation, no arbitration proceeding shall lie at the instance of either party either for recovery of any sum claimed to be due under the said sub-section or for disputing the correctness of such claim:

Provided that whenever proceeding are taken against any person for the recovery of any such sum, he may pay the amount claimed under protest to the officer taking such proceedings, and upon such payment the proceedings shall be stayed and the person against whom such proceedings were taken may make a reference under or otherwise enforce an arbitration agreement in respect of the amount so pay, and the provisions of Section 183 of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950, as the case may be, shall mutates mutandis apply in relation to such reference or enforcement as they apply in relation to any suit in the Civil Court.

(5) Save as otherwise expressly provided in the proviso to Sub-section (4) of this section or in Section 183 of the U.P. Land Revenue Act, 1901 or Section 287A of the Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950 every certificate sent to the Collector under Sub-section (1) shall be final and shall not be called in question in any original suit, application (including any application under the Arbitration Act, 1940) or in any reference to arbitration, and no injunction shall be granted by any Court or other authority in respect of any action taken or intended to be taken in pursuance of any power conferred by or under this Act.

12. In the case before us, there is no dispute that the respondent No. 1 is a Corporation within the meaning of the Act of 1972. According to the appellants, by an agreement dated July 2, 1997, the respondent No. 1 appointed the appellant No. 1, a registered partnership firm, as its depot handling agent for handling the depot-functions and allied matters concerning the sale depots, the respondent No. 1 decided to open in Kolkata. In terms of the said agreement, the goods supplied by the respondent No. 1 were to be received by the appellant No. 1 for storing those in a godown and selling to the appointed dealers of the respondent No. 1 against payment. According to the said agreement, the appellant No. 1 was required to deposit the payment of every bill by way of pay order in the principal's account on the next working day and it was mandatory to send the accounts to the respondents No. 1 at its Head Office at Kanpur. The appellant No. 1, in return, was to receive remuneration @ 24% of the monthly ex-mill sales-turnover made through the depot. It was further provided that the disputes and differences arising out of the contract would be referred to the Chairman, U.P. Textile Corporation Ltd. or his nominee who would decide the matter as the sole arbitrator. Proceedings relating to arbitration, it was provided, would be governed by the Arbitration and Conciliation Act, 1996. In paragraph 32 of the agreement, it was provided that all amounts payable under the agreement

by the appellant No. 1 to the respondent No. 1 would be recoverable as arrears of land revenue in accordance with the provisions of the U.P. Public Moneys (Recovery of Dues) Act, 1972.

13. After going through the provision contained in Section 3 of the Act, we find that in order to invoke the said provision what is necessary is that the case must come under any of the Clauses (a) to (d) of Section 3(1) of the Act. In the case before us, the respondent No. 1 being undisputedly a corporation within the meaning of the Act and in view of paragraph 32 of the agreement providing that all amount payable by the appellant No. 1 under the agreement to the respondent No. 1 would be recoverable as arrear of land revenue, Clause (d) of Section 3(1) of the Act is clearly attracted and thus, the place of business out of which the amount is payable is immaterial. The money being accountable in the Head Office of the respondent No. 1 at Kanpur within the State of Uttar Pradesh, the certificate proceedings initiated under the Act is quite legal and tenable. Therefore, the first point raised in this appeal was rightly answered by the learned Single Judge against the appellants.

14. The second point that in order to initiate the certificate proceedings under the Act, the money payable must be "advance or loan" given by the respondent No. 1 is equally devoid of any substance inasmuch as the case before us comes under Sub-section (d) of Section 3(1) of the Act and in such a situation, the money payable need not be "advance or loan".

15. As regards the third question raised by the appellants, we find that in terms of Sub-section (4) of Section 3 of the Act, the appellants are entitled to raise dispute as regards the quantum by depositing the amount with protest as provided in the proviso to the Sub-section (4) of Section 3 of the Act. Therefore, "the opportunity of being heard" has not been taken away from the appellant notwithstanding the issue of the certificate. Moreover, the validity of the Act not having been challenged, there is no scope of examining the legality of the Act in the light of the provisions of the Constitution of India in this proceeding.

16. As regards the new point advanced before us for the first time by the appellants that the certificate was not in conformity with the provisions of the Uttar Pradesh Amendment of the Revenue Recovery Act, 1890, Mr. Chatterjee, the learned Senior Advocate appearing on behalf of the respondent No. 1, vehemently contended that there being no foundation of such new point in the pleading before the learned Single Judge, we, the Appellate Court, should not permit the appellants to raise such a new point for the first time in this appeal. Mr. Chatterjee further contends that even in the memorandum of appeal such point was not taken and thus, we should not enter into such new point.

17. It is now a settled law that a pure question of law which requires no new investigation of fact can be raised for the first time in appeal but if the same is a mixed question of law and fact requiring investigation of disputed facts, the same cannot be permitted to be raised for the first time in the Appellate Court. It is

true that in the writ application such point was not taken and in this appeal, pursuant to our direction, when the true copies of the certificates were annexed to the affidavit filed by the respondent No. 1, on scrutiny of the certificates, the new point was raised. In the writ application, the self-same certificate was challenged but the purported defect in the certificate sought to be raised in this appeal was not taken as the writ petitioners were not aware of the contents of the certificate. In the writ application, there was prayer of certiorari for production of the original records. This Court as an Appellate Court wanted to inspect the certificate and directed the respondent No. 1 to disclose the certificates by affidavit and the respondent No. 1 complied with such direction. The appellant without disputing the genuineness of the certificate or contents thereof has impugned the same as not in conformity of the Act of 1890 and the Rules framed thereunder.

18. We find no substance in the contention of Mr. Chatterjee, the learned Senior Advocate appearing on behalf of the respondent No. 1, that as an Appellate Court it was beyond our competence to direct his client to disclose the very certificate which was the subject-matter of challenge in the writ application. The certificate impugned is not a privileged document and thus, the respondent No. 1 cannot claim its immunity from production of such document which has been impugned in the writ application. Similarly, simply because a particular point of law has not been included in the grounds taken in the memorandum of appeal, such omission is not a justified reason for refusing the appellants to agitate the point provided sufficient notice is given to the respondent to meet such new point. In this case, we adjourned the matter to enable the respondent to oppose the point sought to be raised by the appellant for the first time before this Court regarding construction of the certificate admittedly issued against the appellants at the instance of the respondent No. 1.

19. At this juncture it will not be out of place to refer to the following observations of a three-Judges Bench of the Supreme Court in the case of Yeswant Deorao Deshmukh Vs. Walchand Ramchand Kothari, , which, till this day, have not been disputed by any subsequent Bench of the said Court where the Court dealt with the question whether a pure question of law can be raised for the first time before the Appellate Court:

No reliance was placed on Section 18, Limitation Act, in the Courts below and no reference to it is found in the grounds of appeal to this Court. It is, however, mentioned for the first time in the appellant's statement of the case. If the facts proved and found as established are sufficient to make out a case of fraud within the meaning of Section 8, this objection may not be serious, as the question of the applicability of the section will be only a question of law and such a question could be raised at any stage of the case and also in the final Court of Appeal. The following observations of Lord Watson in Connecticut Fire Insurance Co. v. Kavanagh (1892) AC 473, are relevant. He said:

When a question of law is raised for the first time in a Court of last resort upon

the construction of a document or upon facts either admitted or proved beyond controversy, it is not only competent but expedient in the interests of justice to entertain the plea. The expediency of adopting that course may be doubted when the plea cannot be disposed of without deciding nice questions of fact in considering which the Court of ultimate review is placed in a much less advantageous position than the Courts below.

(Emphasis supplied).

20. We, therefore, propose to consider whether the point sought to be raised for the first time is really a pure question of law requiring investigation of no new or disputed fact and even if it is so, whether the defect, if any, vitiates the proceedings.

21. In order to appreciate the question raised, we find it appropriate to quote the Uttar Pradesh Amendment of Sections 5A and 11 the Revenue Recovery Act, 1890 and the Rule 6 framed thereunder:

5A. Certificates in respect of sums recoverable as arrears of revenue by either public officer or local authorities from defaulters being or having property outside Uttar Pradesh. - Where any sum is recoverable as an arrear of land revenue by any public officer other than a Collector or by any local authority, and the defaulter is or has property in a district outside Uttar Pradesh, the Collector of the district in which the office of that officer or authority is situate may, on the request of the officer or authority, send a certificate of the amount to be recovered to the Collector of the district where the defaulter is or has property under the foregoing provisions of the Act as if the sum were payable to himself.

11.(1) The State Government may by notification in the Gazette make rules for carrying out the purposes of this Act.

(2) All rules made under this Act shall, as soon as may be laid before each House of the State Legislature, while it is in session, for a total period of fourteen days extending in its one session or more than one successive sessions, and shall unless some later date is appointed take effect from the date of their publication in the Gazette subject to such modifications or annulments as the two Houses of the Legislature may agree to make, so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done thereunder.

Rule 6. Section 11(1): Procedure for sending the letter of request u/s 5A of the Act for recovery of arrears as arrears of land revenue. Where the defaulter is or has property outside Uttar Pradesh, the public officer or the local authority, as the case may be, may send under his hand and seal to the Collector of the district in which the office of the public officer or the local authority is situated, a letter of request with a list of defaulters showing therein their names, parental complete description and location of their property, if any, from which the recovery is likely to be made. On receipt of the letter and the list, the Collector will issue the

recovery certificate in the form as nearly as may be of the Schedule of the Act.

22. After going through the letter of request issued by the respondent No. 1 to the Collector of Kanpur and the consequent request made by the Collector of Kanpur to the Collector of Kolkata enclosing the certificate, we do not find any illegality or material irregularity in the procedure adopted by the Collector of Kanpur or the respondent No. 1 so as to vitiate the recovery proceedings on the ground of non-compliance of either Section 5A of the 1890 Act or the Rules framed thereunder. Moreover, the actions on the part of the Collector of Kanpur or the Collector of Kolkata cannot be investigated in their absence in this proceeding. Therefore, the additional point sought to be raised in this appeal is not even tenable in the eye of law.

23. All the points taken by the appellants having failed, we find no merit in this appeal and consequently, the same is dismissed with costs which we assess at 500 Gms. payable by the appellants to the respondent No. 1.

Rudrendra Nath Banerjee, J.

24. I agree.