

(2007) 12 BOM CK 0052

In the Bombay High Court

Case No : Writ Petition No. 4376 of 2007

Vitthal Sahakari Sakhar Karkhana and Deepak Nagnath
Nalwade

APPELLANT

Vs

The Assistant Provident Fund Commissioner, Special Recovery
Officer, Gangapur Sahakari Sakhar Karkhana and The Bank of
India, Branch at Kurduwadi

RESPONDENT

Date of Decision : 18-12-2007

Acts Referred:

Constitution of India, 1950 — Article 19(1)

Easements Act, 1882 — Section 52

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 17B

Citation : (2008) 2 ALLMR 158 : (2008) 2 BomCR 71 : (2008) 110 BOMLR 120 :
(2008) 117 FLR 907 : (2008) 2 LLJ 836 : (2008) 3 MhLj 114 : (2009) 3 SLJ 442

Hon'ble Judges : P.V. Kakade, J;N.V. Dabholkar, J

Bench : Division Bench

Advocate : R.N. Dhorde and R.L. Kute, for the Appellant; K.B. Chaudhari, for R.
No. 1, Mansi P. Joshi, for R. No. 2 and N.N. Kapadia, for R. No. 3, for the
Respondent

Judgement

P.V. Kakade, J.—By this petition, the petitioners seek quashing of impugned order of attachment dated 13.6.2007 as well as attachment warrant and consequent panchanama dated 14.6.2007 issued by respondent No. 1 on the ground that it is violative of Article 19(1)(g) of the Constitution of India as well as the provisions of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 along with other consequential reliefs. In view of the facts and circumstances, Rule. Rule is made returnable forthwith by consent. Heard learned Counsel for respective parties.

2. The petitioner No. 1 is a co-operative society registered under the Maharashtra Co-operative Societies Act, 1960 and is a Co-operative Sugar Factory, namely Vitthal Sahakari Sakhar Karkhana. Petitioner No. 2 is one of the members of the petitioner no.1 sugar factory. Respondent No. 1 is the Assistant

Provident Fund Commissioner, in charge Special Recovery Officer, Aurangabad who is having overall control over the sugar factories in the State. Respondent No. 2 is also a Co-operative Sugar Factory namely, Gangapur Sahakari Sakhar Karkhana Ltd., Raghunath Nagar, Tq. Gangapur, Dist. Aurangabad. Respondent No. 3 is a Bank with which the attached goods were pledged before the attachment was effected by respondent no.1.

3. The petitioners are challenging the legality, validity and propriety of the order of attachment of the property, dated 13.6.2007 stating that the petitioner no.1 factory is in the business of production of sugar. Respondent No. 2 sugar factory is also a cooperative sugar factory in Gangapur taluka, District Aurangabad and it was closed due to various difficulties and could not commence production of sugar properly to complete the crushing season in the year, 2005-06 and eventually, it was closed. Therefore, respondent no.2 factory, through proper channels, took a decision to hand over the conducting of the business to the petitioners after obtaining consent of the Labour Unions as well as obtaining "No Objection Certificate" from the Maharashtra State Co-operative Bank, which is its Banker. Respondent No. 2 also made application to the Commissioner of Sugar seeking permission to start Respondent No. 2 sugar factory in partnership with petitioners and joint application u/s 20 of the Maharashtra Co-operative Societies Act, 1960 (for short, M.C.S. Act) was also made to the Commissioner of Sugar who granted permission to run Respondent No. 2 factory in partnership. All these activities culminated in execution of partnership agreement on 9.11.2006 between the petitioner No. 1 and Respondent No. 2, which came to be registered and petitioners sugar factory started crushing sugar-cane from 17.11.2006. The petitioners sugar factory made an application to the Excise Department stating that they were manufacturing sugar and would pay excise duty as per the agreement and, therefore, a separate account was allowed to be maintained. On 14.5.2006, the petitioner sugar factory stopped crushing of sugar-cane for the said season. It had crushed 2,53,169 M.T. sugar-cane and manufactured sugar to the extent of 2,61,400 quintals. Some of the said sugar was sold with permission of the authorities and with the permission of the Excise Department. Remaining sugar is stored in the godown and permission of the Excise Department is also required for the said purpose. According to the petitioners, the sugar which was manufactured during the crushing season 2006-07 is the sugar manufactured by petitioner no.1 sugar factory and it has nothing to do with the liability of Respondent No. 2 sugar factory prior to entering into agreement dated 9.11.2006 and, therefore, prior to 9.11.2006, for any liability which accrued in respect of any claim against Respondent No. 2, the petitioner sugar factory was not liable in law which was quite clear from the partnership agreement itself. However, despite this fact, Respondent No. 1 authority illegally, arbitrarily on 14.7.2007 directly attached the sugar of the petitioner no.1 factory for the claim against Respondent No. 2 towards Provident Fund dues which accrued admittedly prior to 9.11.2006 i.e. the date of execution of agreement.

4. Hence, the petitioners objection to the action of Respondent No. 1 is two fold,

namely, (i) the attachment of the sugar produced by petitioner no.1 after the date of agreement was perse illegal and (ii) such attachment was effected without notice to the petitioners inspite of the fact that Respondent No. 2 sugar factory had sought no objection certificate from Respondent No. 1 by repeated communications, bringing to their notice the existence of the agreement.

5. The Bank of India - respondent no.3 is made party to the petition as their right is also affected in the sense that the petitioners have pledged the sugar under attachment with the said Bank prior to the attachment effected by Respondent No. 1. The Bank has sought to make out a case that since the sugar was pledged with them, they have precedence over the claim of Respondent No. 1 and it had no right to attach the said sugar as Respondent No. 1 being unsecured creditor, their right cannot prevail over the right of Pawnee over the sugar.

6. The petition is vehemently challenged on behalf of Respondent No. 1. Mr. K.B. Chaudhari, learned Counsel for Respondent No. 1, to buttress the submission made in the affidavit-in-reply filed on behalf of Respondent No. 1, submitted that provisions of Section 17B of the Employees Provident Funds and Miscellaneous Provisions Act, 1952 (for short, the said Act) are clear enough to show that the said provision shall prevail, under which their action is legally justified. It was further submitted by Mr. Chaudhari that the agreement executed between petitioners and respondent no.2, being contrary to the provisions of Section 17B of the said Act, cannot sustain in law and, therefore, action taken by Respondent No. 1 is just, legal and valid, under which the dues recoverable under the provisions of the said Act from respondent no.2, could also be recovered from the product from the said Respondent No. 2 factory even though petitioner no.1 has manufactured the said sugar. It was further submitted that u/s 8B of the said Act, the Recovery Officer of Respondent No. 1 could attach the entire property by sealing the same but, considering the interest of workers as well as sugar-cane growers, Respondent No. 1 did not do so taking into account the interest of workers as well as cane growers which was required to be protected. After denying all allegations regarding mala fides on the part of Respondent No. 1, it was submitted by Mr. Chaudhari that taking into account the said legal provision, the petition deserves to be dismissed.

7. After hearing all the concerned parties and taking into account the entire scenario revealed from record, we are of the view that initially it would be advantageous to look into the salient features of the agreement between the parties dated 9.11.2006, which is at Exh.C (page nos.24 to 44 of the petition). This is the agreement of partnership apparently executed under the provisions of Section 20 of the M.C.S. Act. It is also not disputed that before execution of the said agreement, the parties have taken care to obtain consent of the Labour Unions involved as well as have obtained no objection certificate from Maharashtra State Co-operative Bank which is the Banker of Co-operative Sugar Factories and then permissions of Commissioner of Sugar as well as other

authorities were also taken. The record produced on behalf of respondent No. 1 by itself shows that Respondent No. 2 sugar factory repeatedly requested Respondent No. 1 Provident Fund Commissioner to issue no objection certificate for the same. It is apparent that the communications issued by Gangapur Sahakari Sakhar Karkhana dated 22.8.2006, 27.10.2006 and 7.11.2006 bear out this fact. It is also apparent from the notings of Respondent No. 1 on the said documents that they were in receipt of the copy of the agreement between the parties and, therefore, it cannot lie in the mouth of Respondent no.1 that they were not aware of existence of such agreement between the parties, which was initially sought to be canvassed by the learned Counsel for Respondent No. 1.

8. Turning back to the agreement, it is clear that it is an agreement between Gangapur Sahakari Sakhar Karkhana -Respondent No. 2 and the petitioner Vitthal Sahakari Sakhar Karkhana, who is described and treated as "Conductor" of the Karkhana. Plain reading of the terms of the agreement makes it clear that it is nothing but an agreement of conducting the business of manufacture of sugar on rental basis for a specific period. For instance, Clause 5 thereof stipulates that the petitioner no.1 shall be at liberty to pledge the goods produced by the Conductor but no part of the Sugar Factory shall be mortgaged, secured or hypothecated by the Conductor and no charge on any fixed assets owned by Gangapur shall be created by the Conductor. Clause 6.1 stipulates that the Conductor shall neither be responsible for acts, deeds, or omissions, prior to date of execution of agreement nor will be required to attend any suits, cases, litigations, or answer any notices from any Statutory Authorities, in connection with such proceedings. Clauses 6.2 and 6.3 stipulate that the provident fund dues shall be paid by the Conductor from the date of agreement but the conductor shall not be responsible for such dues, along with other dues, for the period prior to the date of agreement. Clause 11 stipulates that all products manufactured during the tenure of the Agreement will be the property of the Conductor and Gangapur shall neither have right, title, interest therein and nor shall the same be liable to be attached by any Bank, Court, Statutory Authority, Government, Worker, Farmer, or Creditor or Gangapur with regard to the liabilities of Gangapur for the period prior to the date of the agreement and the Conductor shall be at full liberty to hypothecate or pledge its own property without reference to the creditors of Gangapur. Similarly, Clause 13 stipulates that any dues for the period prior to the date of the agreement or after the expiry of the agreement shall be the sole liability of Gangapur. Clause 23 lays down that the Provident Fund contributions of the employees engaged by the Conductor as per P.F. Rules and Regulations shall be borne and paid by the Conductor for the period under the Agreement and in any case, the Conductor shall be liable and responsible for the down payment thereof except any dues prior to the date of the Agreement and after the expiry of the Agreement.

9. Therefore, these conditions make it clear that the petitioners - Conductors had taken over responsibility of making payment of provident fund after the date of agreement. Now, it is not in dispute and the record bears out the fact that the

petitioners have paid all the provident fund dues payable to Respondent No. 1 from the date of agreement till the date, and the attachment, which has taken place, is for the dues of provident fund liable to be paid by Respondent No. 2 Gangapur Sugar Factory for the period prior to the date of agreement.

10. Mr. Chaudhari, learned Counsel for Respondent No. 1 placed heavy reliance on the provisions of Section 17B of the said Act, which read thus:

17-B. Liability in case of transfer of establishment.-Where an employer, in relation to an establishment, transfers that establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employers and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other sums due from the employer under any provision of this Act or the Scheme or the Pension Scheme or the Insurance Scheme, as the case may be, in respect of the period up to the date of such transfer. Provided that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer.

The provision of Section 17B of the said Act deals with liability in case of transfer of establishment. Therefore, it is obvious that in order to invoke this provision, the prerequisite is "transfer" of the establishment within the meaning of the said provision. The provision suggests that when an employer transfers any establishment in whole or in part, by sale, gift, lease or licence or in any other manner whatsoever, the employer and the person to whom the establishment is so transferred shall jointly and severally be liable to pay the contribution and other dues. The proviso also makes it clear that the liability of the transferee shall be limited to the value of the assets obtained by him by such transfer. Putting reliance on this provision and in particular, on the phrase "or in any other manner whatsoever...", Mr. Chaudhari submitted that the agreement in question amounts to "transfer" within the meaning of Section 17B of the said Act and, therefore, their action of attachment of the property is justified.

11. We have given our anxious consideration to this submission and have preferred to disagree with the same. Firstly, the agreement with all its incidents, is quite clear to show that no transfer of the establishment of Gangapur Sahakari Sakhar Karkhana to petitioner Sugar factory is contemplated by virtue of the said agreement. What is effected is an agreement for conducting business to manufacture sugar by crushing sugar-cane. While doing so, the parties have agreed that the petitioners shall be entitled to the produced commodity i.e. sugar after date of agreement. Basically, one has to keep in mind that the agreement was a result of anxiety of the parties to keep the sugar factory running in the interest of its workers and cane growers. The intention of the parties in execution of the said agreement is not transfer of the property or assets, nor any benefit is derived by the employer by making any transfer of the property as contemplated by the provision of Section 17B of the said Act. In this regard, reference to the provision of "licence" contemplated by Section 52 of the Indian Easements Act, 1882 would be advantageous. In our considered view, the conducting agreement

amounts only to a licence to the petitioners to enter on the immovable property for a specific purpose, without creating either any lease, or any other incident of transfer contemplated u/s 17B of the said Act and, therefore, it must be said that the action between the petitioners and Respondent No. 2 under the impugned agreement cannot be considered as "transfer" within the meaning of Section 17B of the said Act and, therefore, no question would arise to invoke the said provision to fasten the liability of Gangapur Sugar Factory -Respondent No. 2 in respect of payment of provident fund dues prior to the date of agreement between the parties on the petitioners.

12. At this juncture, we would like to note that the affidavit-in-reply filed on behalf of Respondent No. 1 vide paragraph 3 laments that prior to executing the said agreement deed neither the petitioners nor Respondent No. 2 sought "no objection certificate" from Respondent No. 1, which was necessary under the Act. Now, firstly, the correspondence brought to our notice on behalf of Respondent No. 1 itself shows that there are at least three communications by Respondent No. 2 to seek "no objection certificate" from Respondent No. 1 for the said agreement i.e. dated 22.8.2006, 7.10.2006 and 7.11.2006. Therefore, it cannot lie in the mouth of Respondent No. 1 that concerned parties did not approach it before hand to seek their "no objection certificate" for the said purpose. Secondly, it must be noted that there is no specific provision either to seek, or issue "no objection certificate" as contemplated by Respondent No. 1 in its affidavit-in-reply. Therefore, we are at loss to understand why Respondent No. 1 has made this statement in its affidavit-in-reply. If, Respondent No. 1 was waiting for approach to it either by the petitioners or Respondent No. 2 for "no objection certificate", then again the stand of Respondent No. 1 is belied by the fact that there were several letters issued by Respondent No. 2 Gangapur Sahakari Sakhar Karkhana for issuance of such certificate. The notations made by Respondent no.1 on such correspondence also show that they were in receipt of draft of the agreement between the parties.

13. This aspect leads us to an invariable conclusion that the attachment effected by respondent No. 1 was without notice to the petitioners. The allegation of high-handedness is also apparent on the fact that when the watchman of Petitioner No. 1 allegedly resisted for attachment, F.I.R. was lodged against him in the concerned Police Station. In our considered view, if at all the drastic action of attachment of the property was contemplated by Respondent No. 1, at least, the petitioners deserved due notice and hearing on the issue because there is nothing on record to show that the petitioners were put on alert of the intended action by Respondent No. 1 inspite of the knowledge of Respondent No. 1 that under such agreement, petitioners were running the Karkhana and not Respondent No. 2. Therefore, in our view, on this point also, the impugned action of attachment of the goods belonging to the petitioners, which were already under pledge with Respondent No. 3 was, void ab initio, illegal, arbitrary and violative of Article 19(1)(g) of the Constitution of India.

14. For the reasons stated above, we are of the view that the petition succeeds as the action taken by Respondent No. 1 is illegal and against the principles of natural justice. It is also illegal as Respondent No. 1 was not entitled to invoke the provisions of Section 17B of the said Act, in view of the facts and circumstances of the case. This is more so when the assets belonging to Respondent No. 2 were not only already under attachment but are also liquidated at the behest of Respondent No. 1, as can be seen from the record.

15. In this view of the matter, Rule is made absolute and the petition is allowed in terms of prayer clause (B). In the facts and circumstances, no order as to costs.

At this stage, the learned Counsel for Respondent No. 1 submitted that the order may be stayed for some time. However, in view of the facts and circumstances, the plea stands rejected.