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ITEM NO.34

COURT NO.3

SECTION IX

S U P R E M E C O U R T O F I N D I A  
RECORD OF PROCEEDINGS

Petition(s) for Special Leave to Appeal (Civil) No(s).14772-14773/2010

(From the judgement and order dated 07/04/2010 in WP No.6824/2005,CA No.49/2010 of The HIGH COURT OF BOMBAY)

MAHARASHTRA STATE COOP.BANK LTD.

Petitioner(s)

VERSUS

KANNAD SAHAKARI SAKHAR KARKHANA LD.&ORS.

Respondent(s)

(With appln(s) for permission to file additional documents and with prayer for interim relief)

WITH

SLP(C) NO. 32625-32626 of 2010

(With office report)

SLP(C) NO. 33227 of 2010

(With office report)

SLP(C) NO. 33904 of 2010

(With office report)

SLP(C) NO. 2000 of 2011

SLP(C) NO. 2001 of 2011

SLP(C) NO. 2002-2003 of 2011

SLP(C) NO. 3836-3837 of 2011

SLP(C) NO. 3590 of 2011

SLP(C) NO. 3591 of 2011

SLP(C) NO. 5554-5555 of 2011

SLP(C) NO. 5577 of 2011

Date: 01/07/2013 These Petitions were called on for hearing today.

CORAM :

HON'BLE MR. JUSTICE G.S. SINGHVI

HON'BLE MR. JUSTICE V. GOPALA GOWDA

For Petitioner(s) Mr.M.Y.Deshmukh, Adv.

For Respondent(s) Ms. Arti Singh, Adv.

UPON hearing counsel the Court made the following

O R D E R

These petitions are directed against order dated 7.4.2010 by which the Division Bench of the Bombay High Court dismissed the writ petitions filed by the petitioner for quashing the action taken by Assistant Provident Fund Commissioner and Recovery Officer under the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (for short, 'the 1952 Act') for recovery of the provident fund dues.

Shri M.Y.Deshmukh, learned counsel for the petitioner argued that the Division Bench of the High Court committed an error by relying upon the judgment in Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and others (2009) 10 SCC 123 because the subject matter of that case was an interlocutory order passed by the High Court permitting joint auction of the sugar bags which had been attached by the Provident Fund authorities. Learned counsel emphasised that this Court should not have decided the issue relating to priority of the dues of the workers under Section 11(2) of the 1952 Act because the main petition was pending before the High Court. He then argued that the judgment in Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and others (supra) should be treated as per incurian because while deciding the matter this Court did not consider the provisions of Sections 3, 3D and 3E of the Essential Commodities Act, 1955 (for short, 'the 1955 Act') and various clauses of the Sugarcane (Control) Order, 1966, which cast a duty upon the producer to pay price of sugarcane

to the growers. He lastly argued that the petitioner is a scheduled bank and, therefore, its dues are recoverable in preference to the dues of provident fund.

In our opinion, there is no merit in the arguments of the learned counsel and the special leave petitions are liable to be dismissed.

It is true that the subject matter of the judgment in Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and others (supra) was an interlocutory order passed by the High Court. Shri Ashok H. Desai, learned senior counsel, who appeared on behalf of the petitioner made detailed arguments on the entitlement of the Assistant Provident Fund Commissioner to realize the dues of provident fund, etc., by disposing of the sugar bags pledged with the petitioner. This is evinced from paragraphs 13 and 14 of the judgment, which are extracted below:

"13. Shri Ashok H. Desai, learned Senior Counsel appearing for the appellant assailed the impugned orders and argued that the sugar bags lying in the godowns of the Sugar Mills could not have been attached and sold at the instance of the Assistant Commissioner for realisation of the dues of provident fund, etc. because the same had already been pledged with the appellant Bank. Learned Senior Counsel relied upon the judgments of this Court in Karnataka Pawnbrokers' Assn. v. State of Karnataka and Central Bank of India v. Siriguppa Sugars & Chemicals Ltd. and argued that even though under Section 11(2) of the Act, the amount due from an employer is treated as first charge on the assets of the establishment, the same cannot have priority or precedence over the dues of the appellant Bank, the payment of which is secured by the deeds of pledge executed by the management of the Sugar Mills.

14. Shri Desai referred to various clauses of the deeds of pledge and submitted that for all practical purposes, the appellant Bank had become the owner of the sugar bags and the Recovery Officer did not have the jurisdiction, power or authority to attach the same. Learned Senior Counsel emphasised that the term "assets" used in Section 11(2) of the Act means unencumbered property of the establishment and argued that as the sugar bags pledged with the appellant Bank had become its property, the Recovery Officer was not entitled to attach the same for realising the dues of provident fund, etc. In support of this argument, Shri Desai placed reliance on paras 67 and 73 of the judgment of this Court in Transcore v. Union of India<sup>5</sup>. Another argument of the learned Senior Counsel is that, at best, the amount determined under Section 7-A can be treated as first charge on the assets of the establishment but the interest payable under Section 7-Q and damages levied under Section 14-B cannot be recovered by invoking Section 11(2) of the Act."

This Court extensively referred to the provisions of the 1952 Act (paragraphs 19 to 24) and judgments in Builders Supply Corporation v. Union of India (1965) 2 SCR 289, UCO Bank v. Official Liquidator, High Court of Bombay (1994) 5 SCC 1, State Bank of Bikaner and Jaipur v. National Iron and Steel Rolling Corporation (1995) 2 SCC 19, Dena Bank v. Bhikhabhai Prabhudas Parekh and Company (2000) 5 SCC 694, A.P. State Financial Corporation v. Official Liquidator (2000) 7 SCC 291, Recovery Officer and Assistant Provident Fund Commissioner v. Kerala Financial Corporation (2002) 3 LLJ 643 (Kerala High Court), State of M.P. v. State Bank of Indore (2002) 10 SCC 441, Textile Labour Association v. Official Liquidator (2004) 9 SCC 741, Central Bank of India v. State of Kerala (2009) 4 SCC 94, and observed:

"A careful reading of the deed of pledge dated 5.3.2001 executed by the management of Kannad Sahakari Sakhar Karkhana Ltd. (the terms of three deeds dated 2.1.2003, 6.2.2003 and 4.4.2003 executed by the management of the other Sugar Mill are substantially similar) shows

that even though the sugar bags which were available with the Sugar Mills at the relevant time were placed in the custody of the appellant-bank as security for repayment of loan together with interest, the former continued to be owner thereof. To put it differently, title of the property remained with the Sugar Mills and only limited interest therein was passed on to the appellant-bank as security for repayment of the loan etc. If the management of the Sugar Mills were to repay the dues of the appellant-bank within the time specified in the deeds of pledge, the latter was duty bound to lift its notional control over the sugar bags lying in the godowns of the Sugar Mills. In case of default, the appellant-bank could recover its dues by selling the sugar bags. If the price of the sugar bags was less than the amount due, the appellant-bank could resort to other appropriate adjudicatory mechanism for recovery of the balance amount.

If the sugar bags had become property of the appellant-bank simply because the same were pledged by the management of the Sugar Mills for securing repayment of the loan etc., there was no occasion for the latter to take the responsibility of hiring godowns on behalf of the appellant-bank, pay rent thereof and get the goods insured. Equally, there was no reason for the management of the Sugar Mills to take the responsibility of changing or repairing the godowns and bear its cost or confer immunity upon the bank in the matter of weight, quality, conditions or safety of the goods and take upon itself the responsibility for any shortage, damage or shrinkage and insure the goods against any damage or loss or riots or civil commotion. In our considered view, the very fact that except giving the symbolic custody of the sugar bags to the appellant-bank by allowing it to put lock and key on the godowns, all steps for preserving the goods and getting the same insured were taken by the management of the Sugar Mills which also agreed to take the responsibility of any shortage, damage or shrinkage unmistakably shows that the Sugar Mills continued to be owner of the sugar bags."

The Court then referred to the judgments in *Lallan Prasad v. Rahmat Ali* (1967) 2 SCR 233 and *Bank of Bihar v. State of Bihar* (1972) 3 SCC 196 and observed:

"The ratio of the abovenoted two judgments is that in a contract of pawn the property pledged should be actually or constructively delivered to the pawnee and pawnee has only a special property in the pledge but the general property remains with the pawner and wholly reverts to him on discharge of debt. The right to property vests in the pledgee only so far as necessary to secure his debt. We, therefore, hold that the deeds of pledge executed by the management of the Sugar Mills as security for repayment of loan etc. did not have the effect of transferring of the ownership of the sugar bags to the appellant-bank and the Recovery Officer did not commit any illegality by attaching the same and the High Court was fully justified in directing payment of a portion of the sale price to the Assistant Commissioner for being appropriated towards the provident fund dues of the workers."

The Court finally dealt with the question whether the interest payable in terms of Section 7-Q and damages imposed under Section 14-B of the 1952 Act can be treated as first charge on the assets of the establishment payable in priority to all other debts and answered the same in affirmative by making the following observations:

"Section 11 gives statutory priority to the amount due from the employer vis-à-vis all other debts. Clause (a) of sub-section (1) of Section 11 is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In

that situation, the amount due from the employer in relation to an establishment to which any Scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14-B, accumulations required to be transferred under Section 15(2) or any other charges payable by him under any other provision of this Act or of any provision of the Scheme or the Insurance Scheme. Clause (b) is applicable to cases where the amount is due from the employer in relation to exempted establishment in respect of any contribution to the provident fund or any insurance fund in so far it relates to exempted employees under the rules of provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under Section 17(6), damages recoverable under Section 14-B or any charges payable by him to the appropriate Government under the Act or under any of the conditions specified in Section 17. This sub-section then lays down that such amount shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up. Sub-section (2) lays down that any amount due from the employer whether in respect of the employees' contribution deducted from the wages of the employee or the employer's contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

The expression "any amount due from an employer" appearing in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act No.40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14-B and accumulations required to be transferred under Section 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression 'any amount due from the employer' and confine it to the amount determined under Section 7-A or the contribution payable under Section 8.

If interest payable by the employer under Section 7-Q and damages leviable under Section 14 (sic Section 14-B) are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the concerned authorities to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned senior counsel for the appellant-bank that the amount of interest payable under Section 7-Q and damages leviable under Section 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act."

The Division Bench of the High Court unequivocally rejected the argument made on behalf of the petitioner that the judgment of this Court in Maharashtra State Cooperative Bank Limited v. Assistant Provident Fund Commissioner and others (2009) 10 SCC 123 should be treated as per incuriam by recording the following observations:

"We are unable to accept these contentions of the learned Senior Counsel. In the decision of the Hon'ble Supreme Court in Maharashtra State Co-operative Bank V/s. Assistant Commissioner (Supra), the issue was whether the expression "all other debts" appearing in Section 11(1) and (2) of the Employees' Provident Fund and Misc. Provisions Act, 1952 containing a priority clause would operate against statutory as well as non-statutory and secured as well as unsecured debts including the mortgages or pledges. That issue has been answered by the Supreme Court by holding that first charge created on assets of establishment by Section 11(2) and priority given to the amount due from employer would operate against all types of debt.

The Hon'ble Supreme Court held that the Provident Fund Authorities can proceed against pledged goods. Further, the Hon'ble Supreme Court held that the expression "any amount due from an employer" appearing in Section 11(2) is not confined to amount determined under Section 7-A or contribution payable under Section 8 but covers even interest payable under Section 7-Q, damages leviable under Section 14-B and accumulation required to be transferred under Section 15(2) of the Employees' Provident Fund and Misc. Provisions Act, 1952.

In our opinion, a reading of the Supreme Court decision in this case would demonstrate that the questions raised before us are squarely covered and answered therein. In this behalf, reference can be made to the following observations in the Hon'ble Supreme Court decision :-

"66. Section 11 gives statutory priority to the amount due from the employer vis-a-vis all other debts. Clause (a) of sub-section (1) of Section 11 is applicable to cases where an employer is adjudicated insolvent or, being a company, an order of its winding up is made. In that situation, the amount due from the employer in relation to an establishment to which any scheme or the Insurance Scheme applies in respect of any contribution payable to the Fund or, as the case may be, the Insurance Fund, damages recoverable under Section 14-B, accumulations required to be transferred under Section 15(2) or any other charges payable by him under any other provision of his Act or of any provision of the Scheme or the Insurance Scheme.

Clause (b) is applicable to cases where the amount is due from the employer in relation to exempted establishment in respect of any contribution to the provident fund or any insurance fund insofar it relates to exempted employees under the rules of provident fund or any insurance fund, any contribution payable by him towards the Pension Fund under Section 17(6), damages recoverable under Section 14-B or any charges payable by him to the appropriate Government under the Act or under any of the conditions specified in Section 17.

This sub-section then lays down that such amount shall be paid in priority to all other debts in the distribution of the property of the insolvent or the assets of the company being wound up. Sub-section (2) lays down that any amount due from the employer whether in respect of the employees' contribution deducted from the wages of the employee or the employer's contribution shall be deemed to be the first charge on the assets of the establishment, and shall be paid in priority to all other debts.

67. The expression "any amount due from an employer" appearing

in sub-section (2) of Section 11 has to be interpreted keeping in view the object of the Act and other provisions contained therein including sub-section (1) of Section 11 and Sections 7-A, 7-Q, 14-B and 15(2) which provide for determination of the dues payable by the employer, liability of the employer to pay interest in case the payment of the amount due is delayed and also pay damages, if there is default in making contribution to the Fund. If any amount payable by the employer becomes due and the same is not paid within the stipulated time, then the employer is required to pay interest in terms of the mandate of Section 7-Q. Likewise, default on the employer's part to pay any contribution to the Fund can visit him with the consequence of levy of damages.

68. As mentioned earlier, sub-section (2) was inserted in Section 11 by Amendment Act 40 of 1973 with a view to ensure that payment of provident fund dues of the workers are not defeated by the prior claims of the secured and/or of the unsecured creditors. While enacting sub-section (2), the legislature was conscious of the fact that in terms of existing Section 11 priority has been given to the amount due from an employer in relation to an establishment to which any scheme or fund is applicable including damages recoverable under Section 14-B and accumulations required to be transferred under Section 15(2). The legislature was also aware that in case of delay the employer is statutorily responsible to pay interest in terms of Section 17. Therefore, there is no plausible reason to give a restricted meaning to the expression "any amount due from the employer" and confine it to the amount determined under Section 7-A or the contribution payable under Section 8.

69. If interest payable by the employer under Section 7-Q and damages leviable under Section 14(sic Section 14-B) are excluded from the ambit of expression "any amount due from an employer", every employer will conveniently refrain from paying contribution to the Fund and other dues and resist the efforts of the authorities concerned to recover the dues as arrears of land revenue by contending that the movable or immovable property of the establishment is subject to other debts. Any such interpretation would frustrate the object of introducing the deeming provision and non obstante clause in Section 11(2). Therefore, it is not possible to agree with the learned Senior Counsel for the appellant Bank that the amount of interest payable under Section 7-Q and damages leviable under Section 14-B do not form part of the amount due from an employer for the purpose of Section 11(2) of the Act."

In our opinion, the High Court had rightly taken the view that the issue raised by the petitioner had been conclusively decided by this Court and there was no valid ground or justification to overlook the ratio of the law laid down in Maharashtra State Cooperative Bank Ltd. v. Assistant Provident Fund Commissioner (supra).

The provisions of Essential Commodities Act and the orders framed thereunder do not have any bearing on the interpretation of Section 11(2) of the 1952 Act, which was inserted by Amendment Act No. 40 of 1973. Those provisions have been enacted to ensure timely payment of price by the producer of sugar to the cane growers. They do not deal with the issue of payment of compensation of provident dues or the question whether such dues have priority over other debts. The fact that the petitioner is a scheduled bank also does not have any bearing on the correct interpretation of Section 11 of the 1952 Act. Therefore, we cannot ignore the ratio of the three Judge Bench judgment by entertaining a wholly untenable argument advanced by learned counsel for the petitioner.

For the reasons mentioned above, we hold that the impugned

order does not suffer from any legal infirmity. The special leave petitions are, accordingly, dismissed.

(Satish K.Yadav)  
Court Master

(Usha Sharma)  
Court Master

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