nsc.

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELALTE JURISDICTION

WRIT PETITION NO.5108 OF 2014

Indian Sugar Manufacturing Company Limited
Unit no.2, (Gat no.160, Turkpimpri)
Taluka : Barshi, District – Solapur. ...Petitioner

v/s.

1. Union of India
Through its Ministry of Consumer Affairs,
Food and PD,
Department of Food and PD,
Directorate of Sugar,
Krishi Bhavan,
New Delhi.
[Summons to be served on the
Learned Government Pleader appearing for
Union of India under Order XXVII,
Rule 4, of the Code of Civil Procedure, 1908]

2. Commissioner of Sugar,
Maharashtra State,
Pune.
[Summons to be served on the
Learned Government Pleader appearing for
State of Maharashtra under Order XXVII,
Rule 4, of the Code of Civil Procedure, 1908]

3. State of Maharashtra
[Summons to be served on the
Learned Government Pleader appearing for
State of Maharashtra under Order XXVII,

Rule 4, of the Code of Civil Procedure, 1908]

4. The Manager,
State Bank of India,
Branch Kurduwadi,
Tq.Madha, District – Solapur. ...Respondents.

Mr.Amol A. Gatne and Mr.S.B.Deshmukh, for the Petitioner.

Mr.Y.R.Mishra a/w Mr.D.A.Dube, for the Respondent No.1 – UOI.

Ms.M.P.Thakur, AGP for the Respondent Nos.2 and 3.

CORAM : A. S. OKA &
REVATI MOHITE DERE, JJ.

RESERVED ON : 2nd JULY, 2015

PRONOUNCED ON : 21st JULY, 2015.

JUDGMENT (Per Revati Mohite Dere, J.) :-

1. Rule. Rule is made returnable forthwith with the consent of the parties. We have heard the learned counsel representing the petitioner and the learned counsel appearing for the respondents.

2. By this petition, preferred under Article 226 of the Constitution of India, the petitioner seeks (i) quashing and setting aside of the impugned order dated 4th/9th April, 2014, passed by the first respondent,

by which the Bank Guarantee No.97 of 2011 dated 8th March, 2011 came to be confiscated and (ii) a direction to the respondent no.4 - State Bank of India, not to encash /revoke the said Bank Guarantee No.97 of 2011 dated 8th March, 2011.

3. The grievance of the learned counsel appearing for the petitioner is three fold ; (i) that there is breach of the principles of natural justice inasmuch as, the order dated 4th/9th April, 2014, was passed by the first respondent, without hearing the petitioner and as such is contrary to Rule 6D of the Sugarcane (Control) (Amendment) Order dated 10th November, 2006, (hereinafter referred to as the 'said order' for the sake of brevity) passed by the Ministry of Consumer Affairs, Food and Public Distribution (Department of Food and Public Distribution), New Delhi ; (ii) that under the provisions of the Sugarcane (Control) (Amendment) Order, 2006 more particularly Rule 6C of the said order, the performance Bank Guarantee can be forfeited by the first respondent, only when the time granted for taking effective steps lapses i.e. after 4 years, from the grant of IEM and that prior to that it was not open for the first respondent to either forfeit / confiscate the Bank Guarantee given by the petitioner and (iii) that the petitioner alone was entitled to seek cancellation of the

Bank Guarantee and refund of the said amount prior to the completion of 4 years period under Section 6C of the said order and that till the completion of the 4 year period, the first respondent was not competent to pass the impugned order. The aforesaid second and third submission advanced by the learned counsel appearing for the petitioner is not required to be dealt with, as this petition ought to succeed on the first ground itself.

4. A few facts as are germane for deciding the present petition are as under :-

The petitioner had preferred an application, for the purpose, of starting a Sugar factory at Kevad, Taluka – Madha, District – Solapur. Accordingly, the petitioner – company was issued a Certificate by the Survey of India for the said location on 8th March, 2011. Pursuant to the same, an application was made by the petitioner to the Commissioner of Sugar seeking permission to start a Sugar factory at Kevad, Taluka – Madha, District – Solapur. The said application was made on 30th June, 2011. The first respondent issued an Aerial Distance Certificate, in respect of Kevad location on 21st January, 2011. Thereafter, on 17th February, 2011, in respect of the said location, the petitioner filed IEM with the

Ministry of Industry, New Delhi. A Bank Guarantee dated 8th March, 2011 was also given by the petitioner in respect of the said location. Accordingly, the petitioner – company is stated to have became a new Sugar factory at Kevad, within the meaning of the provisions of Rule 6A to 6F of the Sugar (Control) Order 1966 as amended by the 2006 Amendment. According to the petitioner, the petitioner – company wanted to start a Unit, at Village – Turkpimpri, Taluka – Barshi, District - Solapur. The distance between the said Village – Turkpimpri and the distance of the earlier location namely Kevad, Taluka – Madha, District – Solapur, is stated to be 1 km. As the petitioner wanted to start the factory at Village – Turkpimpri, the petitioner obtained a Certificate from the Survey of India for the second location namely Village – Turkpimpri and accordingly a Certificate was issued on 16th May, 2011, by the Survey of India. It appears that an application was made to the first respondent for obtaining an Actual Distance Certificate on 19th May, 2011, which is stated to have been received by the first respondent on 20th May, 2011. It appears, that as the application was not decided by the first respondent, the petitioner was constrained to file a Writ Petition, being Writ Petition No.7108 of 2011 in this Court. This Court, vide order dated 16th September, 2011, directed the respondent to decide the petitioner's application within a period of six weeks. Pursuant to the said direction, the first respondent passed an order dated 24th October, 2011, rejecting the petitioner's application. The said order dated 24th October, 2011 was challenged by the petitioner herein, before this Court in Writ Petition No.187 of 2012. This Court vide order dated 25th September, 2013, directed the Commissioner of Sugar to issue the Ariel Distance Certificate to the petitioner, at the new location at Village – Turkpimpri Taluka - Barshi, District Solapur and also directed the petitioner to file an undertaking, that they will not erect a Sugar factory at the earlier location i.e Kevad, Taluka – Madha, District – Solapur. Accordingly, the petitioners herein filed an affidavit of undertaking stating therein, that they will not erect a Sugar factory at Kevad, Taluka – Madha, District – Solapur. Pursuant to the aforesaid directions of this Court, the Commissioner of Sugar issued an Ariel Distance Certificate being Ariel Distance Certificate No.CS/Sec-15/Indian Sugars/1711/2013 to the petitioner. Thereafter, on 25th February, 2014 the first respondent through its Ministry of Industry, duly acknowledged the new IEM, filed by the petitioner herein, on 31st October, 2013. Pursuant thereto, the petitioner furnished a new Bank Guarantee of Rs.1 Crore for the new IEM, which was issued in favour of the petitioner herein for the location at Village –

Turkpimpri Taluka - Barshi, District Solapur. It appears that the petitioner had no grievance till that date. It is only thereafter, that certain events happened resulting in the filing of the present petition. According to the petitioner on 4th / 9th April, 2014, the first respondent suddenly, without giving any opportunity of hearing to the petitioner issued the impugned order dated 4th/9th April, 2014 bearing File No.25(2140)/2011-ST/461, by which the earlier IEM No.560/SIA/IMO/2011 came to be derecognized and the Bank Guarantee no. 97/2011 dated 8th March, 2011 was confiscated. It is this letter which is sought to be impugned in the present writ petition.

5. The learned counsel for the first respondent contested all the aforesaid three grounds raised by the petitioner. The first respondent has filed a reply in the said petition. The said reply has been filed by Shri Suresh Chandra, Deputy Director, Government of India, Ministry of Consumer Affairs, Food and Public Distribution, (Department of Food and Public Distribution), Directorate of Sugar, Krishi Bhawan, New Delhi. With regard to the first submission advanced by the learned counsel for the petitioner, the learned counsel for the first respondent accepted that no hearing was given to the petitioner before the impugned order was passed.

However, according to the first respondent they have acted as per Clause-6D of the Sugarcane (Control) (Amendment) Order, 2006 and have encashed the Bank Guarantee, as it was an admitted position, that the petitioner was not going to comply with the condition, of setting up of a sugar factory at the earlier location and hence no hearing was required to be given to the petitioner. It is also stated in the affidavit that as per the power conferred under Clause – 6D of the Sugarcane (Control) (Amendment) Order, 2006, the Bank Guarantee No.97/2011 dated 8th March, 2011, which was submitted by the petitioner has been confiscated and the IEM No.560/SIA/IMO/2011 dated 17th February, 2011 also stands derecognized vide order dated 4th/9th April, 2014. It is stated that the State Bank of India, Kurdwadi Branch, Taluka – Madha, District – Solapur, had issued the Bank Guarantee for remitting an amount of Rs.1 crore by draft bearing No.565109 till 21st June, 2014 on invocation of the Bank Guarantee No.97/2011 dated 8th March, 2011.

6. Before we deal with the submissions, it would be useful to reproduce the relevant provision i.e. Rule 6D of the Sugarcane (Control) (Amendment) Order, 2006 i.e. :-

> **"6D. <u>Consequences of non-implementation of the provisions laid down in clauses 6B and 6C</u> :-** If an Industrial Entrepreneur Memorandum remains unimplemented within the time specified in clause 6C, **the performance guarantee furnished for its implementation shall be forfeited after giving the concerned person a reasonable opportunity of being heard.**" (emphasis supplied)

7. From a perusal of the aforesaid Rule 6D of the said order, it is evident that the performance guarantee which is furnished for its implementation can be forfeited, only after giving the affected party, a reasonable opportunity of being heard. The said Rule contemplates a right to make a representation and a right to be heard, before the Bank Guarantee can be forfeited. The right has been conferred by Rule 6D of the Sugarcane (Control) (Amendment) Order, 2006 which is passed by the Central Government, in exercise of its powers conferred on it vide Section 3 of the Essential Commodities Act, 1955. Thus, the said right given to a party of being heard, before forfeiture of the Bank Guarantee is a vested right and it is incumbent for the authority to comply with the same. It is well settled, that when a statue confers a right on a party of being heard before any decision is taken, the same ought to be complied with in

earnest. The consequence of non-implementation of the provisions laid down in clause 6B and 6D of the Sugarcane (Control) (Amendment) Order, 2006 entails a serious and drastic consequence, which is forfeiture of the performance guarantee which is furnished for its implementation. Therefore, even in absence of specific provision in Rule 6D, the principles of natural justice must be followed before taking drastic action of forfeiture.

8. It is pertinent to note that the rules of natural justice have been ingrained in the scheme of the Rule 6D of the said Order of 2006, with a view to ensure that any person affected by the forfeiture of his bank guarantee, must get an opportunity to oppose the decision of forfeiture of his Bank Guarantee. Rule 6D represents the statutory embodiment of the Rule of *audi alteram partem* and in a sense confers a valuable right in favour of the person, whose Bank Guarantee is sought to be forfeited. It is not disputed by the first respondent, that the petitioner was not heard before the Bank Guarantee was forfeited. The explanation offered for not hearing the petitioner is unacceptable and totally contrary to the well settled principles of law, and of course contrary to Rule 6D of the Order of 2006. Considering the fact, that no hearing was given as is

contemplated under Rule 6D of the Sugarcane (Control) (Amendment) Order, 2006, we are of the opinion, that the impugned order stands vitiated and ought to be quashed and set aside on this ground alone i.e. breach of the condition of Rule 6D of the Sugarcane (Control) (Amendment) Order, 2006. As we are allowing the petition on this sole ground, it would not be necessary to deal with the other two submissions advanced by the learned counsel for the petitioner as set out in paragraph 2 of the aforesaid order. The affidavit in reply of the first respondent records that the bank guarantee has been already encashed and a sum of Rs.1 crore has been credited. If after remand, the concerned Authority comes to a conclusion that no case is made out to confiscate the back guarantee, the first respondent shall be liable to refund the guarantee amount with 7.5% simple interest thereon from the date of encashment of bank guarantee till the date of payment.

9. Accordingly, we pass the following order :-

ORDER

i) The impugned order dated 4th/9th April, 2014, passed by the First Respondent, by which the Bank Guarantee No.97 of 2011 dated 8th March, 2011 came to be confiscated is hereby quashed and set aside ;

ii) The matter is remitted back to the first respondent with a direction to hear the petitioner and to pass a fresh order within a period of eight weeks from today ;

iii) If after remand, the concerned Authority comes to a conclusion that no case is made out to confiscate the back guarantee, the first respondent shall refund the guarantee amount to the petitioner with 7.5% simple interest thereon from the date of encashment of bank guarantee till the date of payment ;

iv) Rule is made absolute on above terms.

v) All concerned to act upon an authenticated copy of this order.

(REVATI MOHITE DERE,J.) **(A.S. OKA,J.)**