

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION No. 4383 OF 2008

PETITIONER :- Mumbai Agricultural Produce Market Committee
having its registered office at Central Building,
Sector 18, Vashi,
Navi Mumbai.

...VERSUS...

RESPONDENTS :- (1) The Hon'ble Minister for Marketing,
Maharashtra State, Mantralaya.

(2) The Mineral & Metals Trading Co. Ltd.
A Company having its office at MMTC House
Plot No. C-22, Bandra Kurla Complex,
Bandra (E), Mumbai-51.

(3) The State of Maharashtra,
through Joint Secretary,
Food & Civil Supplies Deptt.
Govt. of Maharashtra.

(4) Deputy Secretary,
Mumbai Agricultural Produce Marketing
Committee having its office at
Shri Chhatrapati Shivaji Maharaj Mandal,
3rd Floor, Paltan Road,
Mumbai-400 001.

(5) Collector of Mumbai,
Mumbai Division (Recovery Branch),

having its office at 10th Floor,
Near Chetna College, Bandra (E),
Mumbai-51.

Mr. N.N. Bhadrashetti Advocate for the Petitioner.
Mr. Vikas Mali, A.G.P., for Respondents 1, 3 & 5.
Ms. Naseem Patriwala i/b M/s Pravin Mehta & Methi & Co. for Respdt. no. 2.

CORAM : Naresh H. Patil and S.B. Shukre, JJ.

Judgment Reserved on : 26.06.2015.

Judgment Pronounced on : 20.7.2015.

JUDGMENT (Per S.B. Shukre, J.) :

This petition challenges the order dated 3.11.2007 passed by respondent no. 1, thereby setting aside the demand notice dated 23.4.2002 issued by the petitioner and order dated 7.6.2004 passed by the Director of Marketing.

2. Facts insofar as they are necessary for deciding this petition are mentioned as herein below :

(i) Respondent no.3/State had imported 6220 and 3780 Mts. of RBS palmolein oil, an item under open general licence, in terms of its Export-Import Policy, 1997-2002 through respondent no. 2. For this purpose, respondent no. 3 entered into two separate contracts dated 30.10.2000 and 23.10.2000 with

respondent no.2 (hereinafter referred to as “said agreements” for short). It was the case of the petitioner that these two contracts represented sale transaction in respect of palmolein oil between respondent no. 2 and 3. Petitioner further contended that as this sale transaction took place within the market area of the petitioner-committee, it was subject to levy of market fee and also supervision charges on the import of palmolein oil, an agricultural produce and, therefore, by its notice dated 29.9.2001 it called upon respondent no. 2 to pay market fee and supervision charges. Respondent no. 2 was also informed that upon its failure to meet the demand notice, petitioner would be constrained to take necessary action in the matter. Respondent no. 2, by its letter dated 1.10.2001, called upon respondent no. 3 to pay the market fee and said charges. However, neither respondent no. 2 nor respondent no. 3 paid the market fee and supervision charges, as a result of which by the letter dated 13.11.2001 the petitioner called upon respondent no. 2 to pay the market fee of Rs.14,19,737.95 and also supervision charges of Rs.94,649.20, aggregating to Rs.15,14,387.15.

(ii) The respondent no.2, however, failed to pay the said amount of market fee and supervision charges and, therefore, an order dated 28.12.2001 was passed thereby calling upon respondent no. 2 to pay the said amount of Rs.15,14,387.15. Accordingly, a demand notice dated 23.4.2002 was also sent to respondent no.2.

(iii) Being aggrieved by the said order, respondent no. 2 preferred a writ petition, being W.P. No. 1449 of 2002 challenging the said order dated 28.12.2001 and also the notice issued in pursuance thereof. However, this Court directed the respondent no. 2 to file an appeal in view of the fact that remedy in the nature of appeal to the Director of Marketing was available. Accordingly, respondent no. 2 preferred an appeal, being Appeal No. 34 of 2002, before the Director of Marketing, challenging the said order dated 28.10.2001, which appeal was rejected by the Director of Marketing, Maharashtra State, Pune by his order dated 7.6.2004.

(iv) Thereafter, respondent no. 2 preferred a revision application, being Revision No. 13/04, challenging the said order of 7.6.2004 passed by the Director of Marketing before respondent no. 1, the Hon'ble Minister for Marketing, Maharashtra State. The respondent no. 1 after hearing the parties, allowed the revision application by his order dated 3.11.2007 and quashed and set aside the notice of demand issued by the petitioner and the order dated 7.6.2004 passed by the Director of Marketing, Maharashtra State. Not being satisfied with the same, now the petitioner is before this Court in the present writ petition.

3. Shri N.N. Bhadrashetti, learned counsel for the petitioner, has submitted that the fee and charges as levied by the

petitioner in terms of its order dated 28.12.2001 are due from and payable by either respondent no. 2 or respondent no.3, being the market fee payable under Section 31 of the Agricultural Produce Marketing Committee Act (for short APMC Act) on marketing of an agricultural produce, i.e. palmolein oil, purchased by the State from respondent no. 2 under its two agreements with respondent no.2. He submits that under Section 31 of the APMC Act, the petitioner is competent to levy and collect market fee from every seller or purchaser of agricultural produce marketed in the market area of the petitioner-committee. He submits that since the transaction of sale and purchase had taken place within the area of the petitioner-committee, the respondents 2 and 3 cannot escape from their liability to pay the market fee. He further submits that the palmolein oil that was purchased by respondent no.3 from respondent no. 2 was weighed and re-packed in different packings by respondents 2 and 3 through the Maharashtra Industrial Co-operative Society Ltd., Mumbai, and this fact would clearly indicate that the purchasing of palmolein oil by respondent no. 3 amounted to marketing within the area of the petitioner. But, he concedes the fact that there was no service rendered by supervising the buying and selling of palmolein oil and, therefore, supervision charges could not have been recovered by the petitioner, as held in the case of **Mumbai Agricultural Produce Market Committee & anr. v. Hindustan Lever Ltd. & ors. - AIR 2008 SC 2215.**

4. Mr. Vikas Mali, learned AGP for respondents 1, 3 and 5, submits that palmolein oil, an edible oil, was imported by respondent no. 3 through the agency of respondent no. 2, a Govt. company for the purpose of its distribution through Public Distribution System across the State of Maharashtra, and it was meant for the benefit of weaker sections of the society. He submits that this being the purpose of import of edible oil, there was no question of earning profit in the whole transaction by the State of Maharashtra and, therefore, there was no transaction of sale and purchase in between respondent no. 2 and respondent no. 3. He further submits that respondent no. 3 could not have imported edible oil directly from foreign sellers and it was necessary for it to have some agency to do the task on its behalf and accordingly it entered into agreements with respondent no. 2 for importing the edible oil for its distribution amongst the weaker sections of the State through Public Distribution System and these agreements though titled as "Contract (EX TANK SALE)", according to him, were effectively contracts of agency wherein respondent no. 2 was the agent appointed by the principal-respondent no.3 for the purpose of importing edible oil on behalf of respondent no. 3. In support, he invites our attention to the copies of the agreements dated 13.10.2000 and 23.10.2000, which are forming parts of the paper-book as documents at Ex.A & Ex.B.

5. The learned AGP further submits that the notification

dated 2.5.1997, issued by the State under Section 59 of the APMC Act, copy of which is available on record vide Ex.H, exempts imported edible oil which is despatched to places outside the market area of the petitioner from payment of market fee and, in the instant case, a substantial portion of the edible oil imported through respondent no. 2 was sent outside the market area of the petitioner and, therefore, no market fee could have been levied upon the imported edible oil.

6. Learned AGP further submits that the term “marketing” is important as under Section 31(1), market fee is leviable only on that agricultural produce which is marketed in the market area. He further submits that even if it is assumed that the agreements dated 13.10.2000 and 23.10.2000, which form the basis for procurement of imported edible oil, reflect sale-purchase transaction, still such transaction by itself does not amount to marketing within the market area of the petitioner. He further submits that the term “marketing” is of wide import and requires something more than that of sale. He submits that in the instant case, nothing was offered for sale by respondent no. 2 and, therefore, there was no marketing. Thus, he urges that the petition is devoid of any merits.

7. Ms. Naseem Patrawala has, by and large, argued on the similar lines as learned AGP for the State and is supporting the

impugned order passed by respondent no. 1.

8. The arguments of the petitioner and respondents would show that this petition raises three questions; viz. (i) whether the agreements dated 30.10.2000 and 23.10.2000 between respondents 2 and 3 connoted any employment of respondent no. 2 as agent of respondent no. 3 for the purpose of importing of palmolein oil on behalf of respondent no.3?; (ii) whether the purchase of palmolein oil by respondent no. 3 from respondent no. 2 by itself amounted to marketing of agricultural produce within the market area of the petitioner?; and (iii) if the answer to question no. (ii) is in the affirmative, on whom the liability to pay the market fee would fall?

9. Now, let us deal with the first question. Under Section 182 of The Indian Contract Act, 1872, an “agent” is a person employed to do any act for another or to represent another in dealings with third persons. The person for whom something is done or who is so represented is called the principal. Thus, a contract of agency is created only when authority is given to a person called the agent to represent the principal in dealing with third persons or to do something for the principal. Whatever is done by the agent in pursuance of such an authority or employment, would be for and in the name of the principal and, therefore, could be said in law to be done by the principal only.

That is the reason why in the case of **National Textile Corporation Ltd. v. Nareshkumar Badrikumar Jagad & ors. - AIR 2012 SC 264**, in paragraph 22, the Hon'ble Apex Court described the relationship between agent and principal in these words -

“..... An agent is merely an extended hand of the principal and cannot claim independent rights.”

10. In the case of **Southern Roadways Ltd., Madurai v. S.M. Krishnan – AIR 1990 SC 673** while examining the issue as to whether the possession of the agent can be termed to be the possession of the principal for all purposes including the acquisition of title and the Hon'ble Apex Court held that agent who receives property from or for his principal, obtains no interest for himself in the property for the reason that possession of the agent is the possession of the principal and in view of the fiduciary relationship the agent cannot claim his own possession.

11. In the case of **Kalyanji Kuwarji v. Tirkaram Sheolal & ors. - AIR 1938 Nagpur 254** Single Bench of Nagpur High Court dealt with the question as to whether a commission agent engaged by a principal for selling the goods on his behalf on commission could be considered as his agent. The facts of the case were that the plaintiff, a merchant from Khamgaon dealing in the purchase and sale of grain and cotton seed, had engaged the defendants,

also merchants carrying on their business at Sonpat in Punjab to act as commission agents for selling of goods on plaintiff's instructions being received by them at Sonpat. The arrangement was this; plaintiff was to send to the defendants consignment of goods from time to time from Khamgaon; defendants were to keep the goods with them and await instructions from the plaintiff about the sale; then as soon as the plaintiff gave them the word, they were to sell and in due course hand over the sale proceeds to the plaintiff less their commission charges. The money, however, was not to be paid at Khamgaon but at Delhi. Vivian Bose, J. (as his Lordship then was) delivering the judgment devised a twin test for answering the question when his Lordship observed thus :

“The test to my mind is this does the commission agent when he sells have authority to sell in his own name? Has he authority in his own right to pass a valid title? If he has then he is acting as a principal *vis-a-vis* the purchasers and not merely as an agent and therefore from that point on he is a debtor of his erstwhile principal and not merely an agent. Whether this is so or not must of course depend upon the facts in each particular case.”

12. It would be clear from the above-referred cases governing the field that an agent cannot perform an act in his own right and for himself. He is essentially a person who does

something on instructions or under the authority given to him by his principal and his such performance binds the principal. In other words, it is the principal who, in law, is answerable to the third person for the acts done by his agent as long as the acts so performed fall within the scope of employment or authority of the agent. It would then mean that a commission agent would have no authority to sell in his own name and would have no authority in his own right to pass on a valid title.

13. Bearing in mind the afore-stated principles of law, let us now consider the facts of the present case. The recitals of said agreements show that there was a contract of sale and purchase executed between respondent no. 2 and respondent no. 3 . This is reflected by the expression :Whereas Seller has agreed to sell the buyer, who have agreed to buy a quantity of 6,220 Mts". Clause 8 of the agreement is about payment to be made by the buyer, i.e. respondent no. 3, and it shows that not only the value of the palmolein oil worked out in the manner mentioned therein was to be paid by the respondent no. 3 but also all other duties and charges including service charge at certain percentage of the palmolein oil.

14. Learned counsel for respondent no. 2 submits that respondent no. 2 under this contract did not take any profit and agreed to accept only its service charge and, therefore, these

contracts are capable of being construed as ones creating a relationship of agent and principal between respondent no. 2 and respondent no. 3. Learned counsel submits that use of certain words or terms in the contract would not be determinative of the underlying contract and the nature of the contract has to be ascertained from the intention of the parties and its various terms and conditions. There can be no two opinions about the proposition that nature of contract is required to be determined by ascertaining intention of the parties and referring to its terms and conditions. But, just because there is one clause in the contract regarding taking of service charge for the service rendered by the seller that by itself, would not convert the contract into the contract of agency. It depends on the intention of the parties as ascertained by reading the contract as a whole and recitals as well as all the terms and conditions of the contract. In the instant case, not only the recitals but also other terms and conditions do show that intention of the parties was to execute a contract of sale and purchase and not create any agency in respondent no.2.

15. Clauses 8.1, 9, 10, 11 and 12.1 are relevant and throw sufficient light on the nature of contract between respondent nos.2 and 3. Clause 8.1 is about sale by respondent no. 2 to respondent no. 3 and it says that for effecting the sale MMTC shall indicate provisional price per metric ton to buyer based on the cost elements indicated in clause 8 above. Clause 9 requires buyer, i.e.

respondent no. 3 to deposit an amount at the rate of Rs.1,000/- per metric ton as a security for completion of the contract, which was refundable on fulfillment of the obligations under the contract. Clause 10 lays down that seller, i.e. respondent no. 2 shall issue delivery order to the buyer and buyer shall undertake to complete lifting of the material within 30 days from the clearance. Clause 11 takes care of the situation when buyer fails to make payment within the stipulated time. Clause 12 prescribes that in the event of non-payment and non lifting of full or part contracted quantity by the buyer, the seller would be free to effect sale of the un-lifted quantity at buyer's cost, risk and expenses and shall claim all consequential losses/damages, if incurred by the seller. Clause 12.1 particularly refers to authority of seller to sell the goods at his discretion to any other buyer upon failure of the buyer to take delivery within the time agreed between the parties.

16. All the above referred terms and conditions show nothing but authority of respondent no. 2 to sell the goods in it's own right and pass on the title to the goods in it's own right to the specified buyer. The essence of contract of sale under Section 4 of The Sale of Goods Act, 1930 lies in transfer of the property in goods by the seller to a buyer for a price. Whenever the seller transfers or agrees to transfer the property in goods to a buyer for a price, the contract is of sale. As against this, in a contract under which a relationship of agent and principal is created, an agent

cannot deal with the goods as if they are his own goods and cannot pass on the title in his own right to the buyer for a price. These attributes of agency are absent in the said agreements which rather fulfill the characteristics of contract of sale and, therefore, the argument that respondent no. 2 acted only as an agent for importing edible oil on behalf of Government and that there was no sale effected between respondents 2 and 3, cannot be accepted. The first question is answered accordingly.

17. Now the question is, whether the sale and purchase of edible oil that took place between respondents 2 and 3 within the market area of the petitioner amounted to marketing of edible oil or not. We must say it here that there is no dispute in the present case that edible oil that was traded was an agricultural produce. The dispute is as regards it's being marketed within the meaning of Section 31(1) of the APMC Act, as it is only the marketing of an agricultural produce within the market area, which provides the lever to the market committee to collect and levy fees. So, what is important is to consider as to whether or not any marketing of palmolein oil took place.

18. According to learned counsel for the petitioner, sale and purchase of palmolein oil by respondent no. 2 to respondent no. 3 amounted to marketing of the agricultural produce in its area. He also submits that market fee can be collected in such a case

even from the purchaser. In this regard, he relies upon the judgment of Division Bench of this Court in the case of **Devendra Trading Co. v. State of Maharashtra & ors. - 1974 Mh.L.J. 463.** He also submits that palmolein oil was weighed and repacked by the Maharashtra Industrial Co-operative Society Ltd., Mumbai, within the market area of the petitioner and this act would reinforce the claim of the petitioner that there was marketing of edible oil within its area.

19. Learned counsel for respondents 2 and 3, however, would not agree. They submit that there was no marketing of palmolein oil within the market area of the petitioner as the goods were neither displayed for sale nor offered for sale.

20. In order to appreciate the rival arguments, it would be necessary to understand the meaning of the term “marketing” which is the soul of the power of the market committee to levy and collect market fee under Section 31(1) of the APMC Act. The term “marketing” is not defined anywhere in the Act nor our attention has been drawn to any useful reference to the term in the General Clauses Act. Therefore, we are required to turn to its ordinary meaning as defined in the Dictionary. Dictionary meaning of this term, as seen from its definition given in the Oxford Advanced Learner's Dictionary, New 8th Edition, page 942, is “the activity of presenting, advertising and selling a company's products in the best possible way.” The Dictionary meaning shows that marketing

is not mere sale of a commodity but all that which goes into it and which finally enables the sale to take place. It also shows that there is an invitation to all intending buyers to come and buy the product. It is not confined to a single buyer and enables all the prospective purchasers to inspect the product and take a conscious decision for purchasing the product. In other words, marketing is an activity which promotes sale and enables a contract of sale to see the light of the day. It always happens before the actual sale, for after the sale of a product, there remains nothing to promote the product for its sale. So, the term “marketing”, is distinct from the legal concept of 'sale' and it always precedes the latter and enables the latter to fructify. These characteristics of the term “marketing” are also noticed by the Division Bench of this Court in the case of Devendra Trading Company, *supra*. It held that for marketing of a commodity to take place, the commodity must be displayed for sale. Relevant observations appearing in paragraph 11 are reproduced thus :

“The term 'marketed' is not defined in the Act, but word “marketing” connotes the buying and selling of an article. The commodity must be displayed for sale and by a seller and that commodity is purchased by purchaser. These acts constitute marketing of a commodity.”

21. Having understood the term “marketing” so, we do not

think that sale and purchase effected between respondent no. 2 and respondent no. 3 within the market area of the petitioner could be considered as something amounting to marketing of palmolein oil by the respondent no. 2. The reason being that palmolein oil was never displayed for sale by the seller and there was no offer for its sale by the seller. What happened was only a sale and purchase transaction captively made between respondent no. 2 and respondent no. 3. There was no activity of advertising or presenting of palmolein oil to prospective buyers. One party agreed to import in its own right certain quantity of palmolein oil, which the other party agreed to purchase it at the agreed rate. Not only that, upon arrival of goods at Mumbai port, the responsibility for lifting them was of the buyer and all that the seller had to do was to issue a delivery order to the buyer. This contract between seller and buyer, i.e. respondents 2 and 3, was a contract of sale simplicitor borne out of not any marketing but a prior arrangement between the parties for import of edible oil for the benefit of weaker lots of the society. This contract did not take birth out of any activity of advertising, offering and displaying for sale to various prospective customers. There was of course weighment and repacking of palmolein oil, before it was distributed to the weaker sections of the Society. But, these acts were not done for any display and offer for sale of the palmolein oil to prospective buyers. They were done for the convenience of respondent no.3, the buyer after the title in goods had passed on to buyer.

Therefore, we are of the view that the sale and purchase of palmolein oil that took place between respondents 2 and 3 did not amount to marketing of palmolein oil within the market area of the petitioner and, as such, petitioner had no power under Section 31(1) of the APMC Act to levy and collect any market fee on it in the instant case. The second question is answered accordingly.

22. Learned AGP for respondents 1, 3 to 5 has also placed reliance upon the Govt. notification dated 2.5.1997 in order to claim exemption from payment of market fee. On careful perusal of this notification, we find that it cannot be made applicable to the facts of the present case. The notification applies to only that imported oil which is despatched to places outside the market area of the petitioner. In the instant case, part of imported palmolein oil was distributed within the market area of the petitioner. However, for different reasons as stated earlier we have already found that the transaction of sale and purchase between respondents 2 and 3 did not amount to marketing of an agricultural produce, within the market area of the petitioner.

23. As regards the third question, in our opinion, it does not survive as the second question has been answered against the petitioner, and, therefore, there is no need to make any attempt to answer it.

24. In the circumstances, we find that the impugned orders passed by the petitioner-committee and Director of Marketing are illegal and, therefore, have been rightly quashed and set aside by the respondent no. 1 in exercise of his revisional powers by the order passed on 03.11.2007. The petition deserves to be dismissed.

25. Writ petition stands dismissed. No order as to costs.

(S.B.Shukre, J.)

(Naresh H. Patil, J.)

/TA/