**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
BENCH AT AURANGABAD**

4 WRIT PETITION NO. 8674 OF 2015

ABDUL NAJEEB KHAN
VERSUS
THE ASSISTANT PROVIDENT FUND COMMISSIONER AND RECOVERY OFFICER AND OTHERS
...
Advocate for Petitioner : Mr. Adwant S.V.
Advocate for Respondents : Mr. K.B. Choudhari for R/1.
Advocate for Respondents : Mr. P.P. Bafna for R/3.
...

**CORAM : S.C. DHARMADHIKARI &
MANGESH S. PATIL, JJ.**
DATE : 31.07.2017

P.C. :-

. By this petition under Article 226 of the Constitution of India, the petitioner challenges the order contained in the letter dated 18.03.2015 issued by the respondent no.1 to respondent no.2. He also prays that this Court should declare that the second respondent has no right, authority and power to place any condition while allowing an application dated 20.02.2015 filed by it for transfer of plot no. B-47.

2. The whole controversy arises because the third respondent desires to recover the Provident Fund dues as claimed by the first respondent from the purchase price paid by the petitioner, while purchasing the property in an auction sale under the Securitisation and

Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (for short the 'SARFAESI Act').

3. It is common ground that the petitioner is a sole proprietary concern of one Abdul Najib Khan. It is engaged in the manufacture of aluminum utensils. One Turbo Blast Engineers for short the 'Borrower' another proprietary firm borrowed monies from the third respondent Saraswat Co-operative Bank. Since the said Turbo Blast defaulted in re-payment of its dues, a demand notice under Section 13(2) of the SARFAESI Act was issued on 05.09.2003. Thereafter, the action under Section 13(4) of that Act followed and the possession of the property was taken on 11.02.2004. The property was put up for sale (plot no. B-47) of M.I.D.C. Waluj. A sale notice was published by the third respondent bank in the local newspaper on 06.03.2004 and 12.03.2004.

4. The claim of the petitioner is that in the sale/auction notice, no claim or dues of the Provident Fund Commissioner/Department was set out or mentioned. The pendency of that alleged dues, therefore, was not known to the bidders. The petitioner forwarded his offer for a purchase of this plot for Rupees Fifteen Lakhs, this was the highest bid and the petitioner's bid was accepted and the whole transaction was finalised. The petitioner deposited the sum of Rupees Fifteen Lakhs on

12.05.2005. A sale certificate was issued under Rule 9 (6) of the Security Interest (Enforcement) Rules, 2002 and the possession of the secured asset was delivered to the petitioner on 17.05.2005.

5. It is in these circumstances that, the petitioner states that on 20.07.2005, the first respondent sealed the property purchased by the petitioner without any notice to him. That action was contrary to Section 8-G of the Employees Provident Fund and Miscellaneous Provisions Act, 1952. The claim of the first respondent is towards recovery of Provident Fund dues of Turbo Blast Engineers. The argument of the petitioner was that the same cannot be fastened or imposed on the petitioner. That is how the petitioner challenged the sealing of the property in earlier writ petition. This writ petition was disposed of on 04.02.2015, the order of disposal of this petition reads as under:

> *1. Heard. Perused petition and reply.*
>
> *2 . Having regard to the facts of the case, prayers made in the petition and contentions raised by the respondents No. 1 and 3, we have no difficulty to arrive at a conclusion that the respondent No. 3 and respondent No.5 could not have stopped the transaction and took place between the petitioner on one hand and the respondent No.6 on the other. The Respondent No. 6 as secured creditor sold the asset of a defaulter to the*

petitioner. Since the property is now transferred in favour of the petitioner all that respondents No. 3 and 5 can do is to resort to legal provisions for asserting their rights over the assets. It is also clear from the submissions that these two authorities are claiming to have charge over the asset transferred to the petitioner. They are at liberty to recover their dues as per law. The question as to whether the charge is enforceable against the petitioner is an independent question and would depend on facts. We would refrain ourselves from going into the facts of the case and drawing any conclusion on the question as to whether the petitioner had notice of the charge of respondents No.3 and 5. Such question would be decided as and when respondents No. 3 and 5 would initiate the proceedings against the asset of the petitioner for recovery of their dues.

3. The respondent No.4 is also entitled to resort to Section 11 of The Central Excise Act, 1944 for recovery of their dues. Besides that, it is clear from the facts of the case that they have no right to stop the effect of transaction that took place between the Bank and the petitioner.

4. There shall be order in terms of prayer clause ***'B'*** *and* ***'C'****. The petitioner is also given liberty to take suitable action seeking damages against the respondents. Petitioner is also given liberty to apply to respondent No.2-Corporation for getting his name transferred in their record as a lessee in* *respect of the asset of the petitioner.*

5. As per the directions of this Court given on earlier date, Respondent No.6– Bank produced their record of this case. Same is perused and returned to them.

6. Writ Petition is disposed of.”

6. The petitioner states that the respondent no.1 issued a letter to the second respondent-M.I.D.C. on 18.03.2015 which is the impugned letter. A copy of this letter was forwarded by the first respondent to the petitioner. These two communications are at page 41 and 42 of the paper book. The letter/impugned order dated 18.03.2015 reads as under:

“To,
The Regional Officer
MIDC office
MIDC waluj,
Aurangabad

Sub:- Recovery of outstanding P.F. Dues against M/s Turbo Blast Engineers, B-47, MIDC Waluj, Aurangabad bearing P.F. Code No. NG/AUR/80629

M/s Turbo Blast Engineers, Waluj, Aurangabad bearing P.F. Code No. NG/AUR/80629 is in default of Rs. 4,69,976/- towards P.F. Dues and Interest for the period 04/99 to 03/03. The property of the establishment is auctioned by Saraswat Bank to the M/s Z.R. Metals. Hon'ble High Court in its order dated 04.02.2015 in W.P. No. 5707/2005 given liberty to P.F. Department to recover outstanding P.F. dues.

Please note that EPFO is having priority over all other debts u/s 11 (2) of EPF & MP Act 1952, which is already been decided by the Hon'ble Supreme Court in civil appeal No. 6893/2009 (SLP (C) No. 15243 of 2007 and No. 6894 of 2009 (SLP (C) No.20736 of 2017 dtd.08/10/2009 and in the matter of EPFO v/s. Esskay Pharmaceuticals Ltd. in SLP No.7642-7646/2011, upholding the priority of EPF dues under section 11 (2) of EPF and MP Act,1952 over all other dues under section 529, 529 (a) and 530 of Companies Act including dues of secured creditors.

Hon'ble Supreme Court in civil appeal No. 5927 of 2014 vide order dated 02.07.2014 also clear that transferee is liable to pay the amount of Damages and Interest.

In view of the same you are hereby requested to create encumbrance of EPF department over the property of Z.R. Metals and not to transfer the property of the establishment without consent of EPF department.

Recovery Officer/
Asst. P.F. Commissioner
S.R.O., Aurangabad"

7. The contention of Mr. Adwant, appearing for the petitioner is that there is no provision in law and much less the Employees Provident Fund Act which would enable it to recover the monies due and payable by M/s. Turbo Engineers/defaulter from the petitioner, if the defaulter has defaulted in payment of the provident fund dues, then, that cannot be fastened on the property. Assuming that can be fastened without

admitting as it is, a dues attached to the property, still, in the peculiar facts and circumstances when the attachment was not levied nor the order passed to that effect precedes the transaction with the petitioner, then, at best the Provident Fund Department can raise a claim and seek to recover or adjust its dues from the sale proceeds. It can argue that the dues of the Provident Fund Department rank higher in priority than that of anybody else, looked at from any angle, the petitioner cannot be proceeded against.

8. There are other contentions raised as well, but we do not think we should be adverting to them.

9. Mr. Chaudhari, appears for the contesting respondent no.7. Mr. Chaudhari submits that the Assistant Provident Fund Commissioner has filed an affidavit in reply. In that affidavit in reply, it is pointed out as to how M/s. Turbo Blast Engineers, an establishment covered under the provisions of the Employees Provident Fund Act was allotted a code number. The establishment failed to comply with the provisions of the Act and the scheme framed there-under for a period April 1999 to March 2003. Hence, inquiry under Section 7A was considered necessary, that inquiry was concluded on 13.01.2004. The order under Section 7A along with 7Q of the Act was passed by the Competent Authority on

06.02.2004 assessing an amount of Rs. 4,69,976/-. Despite this order the amount was not paid by the establishment and, therefore, a revenue recovery certificate was issued on 05.04.2004.

10. It is claimed that the petitioner purchased this property in the year 2005. The petitioner was aware of the department's dues. The deponent of this affidavit places reliance upon Section 7A of the E.P.F. Act and Section 17B. It is stated that where an employee 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 employer and the person to whom the establishment is so transferred shall jointly and severally liable to pay the contribution and other sums due from the employer under any provisions of the Act or the scheme, that is how the Section 17B is relied upon. It is claimed that this Court has granted liberty to the Provident Fund Department to recover its dues. It is stated that on 12.05.2004, the revenue recovery certificate was put in execution. A demand notice was issued to the defaulter on 12.05.2004, followed by a show cause notice before arrest warrant on 18.06.2004. Pertinently, this deponent says that the prohibitory order under Section 8F to the petitioner was issued on 15.07.2005. Since there is no response from the establishment, on 21.07.2005 office

premises/property was attached. Relying upon Section 11(2) of the E.P.F. Act, it is submitted that dues of the department can be recovered for it has first charge on the assets of the establishment.

11. There are then affidavits filed by the Saraswat Bank respondent no.3, though, not disputing this factual position but supporting the Provident Fund Department, that is on the footing that the property was sold on as is where is and as is what is basis. Therefore, the argument throughout was that the petitioner can be proceeded against for recovery of the dues.

12. When we enquired from Mr. Chaudhari appearing for the petitioner that the Provident Fund Department has admittedly moved in the matter after the petitioner purchased the property and the sale certificate was issued, if that is the conceded position and the petitioner became the owner of the property on 17.05.2005, which is much prior to the Provident Fund Department proceeding under the E.P.F. Act to attach the property. If the attachment is levied on 21.07.2005, then, it is difficult to hold that the defaulter was the owner of the property or that the establishment of M/s. Turbo Engineers continued in possession and in charge of the property.

13. When such position was brought to the notice of Mr. Chaudhari, on instructions, he fairly stated that the E.P.F. Department now cannot go after the property, once it has been sold and in possession of the petitioner. However, it can proceed to recover the sum due from the defaulter by pursuing its charge on the sale proceeds. The argument is that this charge is the first charge on the sale proceeds. We indicated to Mr. Chaudhari that, if his instructions are as above, then, this issue can be kept open and for a decision by an appropriate forum and Authority in appropriate proceedings. This Court will not express any opinion on the rival contentions in that behalf.

14. On further instructions, Mr. Chaudhari would submit that this course is acceptable to the Department and so long as this Court does not express any opinion on this issue, the petition can be disposed of by keeping alive the same.

15. In the light of the factual position placed on record, we are of the view that there is no necessity to decide a larger issue as to whether a SARFAESI sale would over ride any proceedings or claims or particularly attachments and sale under the E.P.F. Act. That issue need not be decided because it is conceded that the attachment order is subsequent to the issuance of the sale certificate in favour of the

petitioner

15. However, the sale proceeds are with the third respondent-bank, we are of the opinion that, even if the sale proceeds which are in possession of the Bank may have been appropriated, still, the Employees Provident Fund Department can proceed in accordance with law and assert its claim of a first charge on the proceeds of the property. If such claim is asserted in appropriate proceedings before appropriate forum, we clarify that all contentions including that of the respondent *inter se* and the defaulter or the petitioner are kept open. We do not see any reason for the petitioner to be impleaded as a party respondent or opponent to such proceedings. Similarly, if the defaulter has any other properties or is continuing its business, the Provident Fund Department can recover its dues by proceeding against the defaulter in accordance with law. Either avenues and remedies are kept open. The rival contentions therein are also kept open.

16. The writ petition is disposed of with the above clarifications.

[MANGESH S. PATIL, J.] **[S.C. DHARMADHIKARI, J.]**

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