

(2011) 12 DEL CK 0378
In the Delhi High Court
Case No : LPA No. 971 of 2011

Glaxo Smith Kline Pharmaceuticals Ltd. and Anr	APPELLANT
Vs	
Union of India and Another	RESPONDENT

Date of Decision : 09-12-2011

Acts Referred:

Employees Provident Funds and Miscellaneous Provisions Act, 1952 — Section 14B
Essential Commodities Act, 1955 — Section 7A

Citation : (2011) 185 DLT 540

Hon'ble Judges : Rajiv Sahai Endlaw, J

Bench : Single Bench

Advocate : T.R. Andhyarujina and Mr. S. Ganesh, with Mr. U.A. Rana, Ms. Mrinal Mazumdar and Mr. Shoumik Ghoshal, for the Appellant; A.S. Chandhiok, ASG with Ms. Maneesha Dhir, K.P.S. Kohli and Mr. Kshitiz Khera, for the Respondent

Final Decision : Dismissed

Judgement

Rajiv Sahai Endlaw, J.—The appeal impugns the order dated 11th November, 2011 of the learned Single Judge dismissing the application of the appellants for interim relief, while issuing notice of the writ petition being W.P.(C) No. 7949/2011 preferred by the appellants.

2. The challenge in the writ petition is to the demand dated 10th October, 2011 of the respondents for Rs. 24744.05 lakhs towards interest. The said interest @ 15% per annum has been claimed on the amount of Rs. 66.35 crores demanded by the respondents from the appellants on 18th June, 1990 in respect of drug Betamethasone and its formulations sold by the appellants at a price higher than the ceiling price fixed by the Govt. of India under the Drug Prices Equalisation Account (DPEA). The appellants had challenged the said demand by filing CWP No. 2170/1990 in this Court and during the pendency whereof, on the application of the appellants, the recovery of said demand from the appellants was stayed. The Division Bench of this Court vide judgment dated 19th October, 2001 set aside the said demand for Rs. 66.35 crores and directed the respondents to re-

compute the demand as per the directions contained in the judgment. The respondents preferred a SLP before the Supreme Court which was granted and re-numbered as Civil Appeal No. 6497/2002 and allowed on 30th March, 2011. Resultantly, the demand of the respondents on the appellants for Rs. 66.35 crores, was upheld. The appellants thereafter on 24th April, 2011 paid Rs. 6364 lakhs to the respondents, having paid Rs. 819 lakhs earlier.

3. The question before the learned Single Judge therefore was whether, the claim of the respondents for interest on the amount demanded in the year 1990 and discharged after 21 years in the year 2011, should be stayed during the pendency of the writ petition challenging the same. The learned Single Judge has declined to do so for the following reasons:-

(i) that the appellants had failed to make out a prima facie case for grant of interim stay. The principal liability of the appellants stood adjudicated by the Supreme Court;

(ii) that the respondents had raised the issue of interest earlier also in their communication dated 29th October, 1996 by demanding interest u/s 7A of the Essential Commodities Act, 1955. The demand for interest was reiterated in the communication dated 3rd May, 2011. It thus could not be said that it was not known to the appellants that the respondents were claiming interest on the demand of which the appellants had obtained stay;

(iii) that even otherwise the appellants should have been aware that they would be liable to pay interest, if eventually their challenge to the demand was to fail. Merely because this Court or the Supreme Court did not make any specific order with regard to the liability towards interest, which would eventually accrue if the demand were to be upheld, would not mean that the appellants can seek to unduly enrich themselves by having avoided the payment of principal liability over the years by resort to litigation. It was held that the appellants had unduly enriched themselves by retaining the monies which were payable in the year 1990. Reliance was placed on Indian Council for Enviro-Legal Action Vs. Union of India (UOI) and Others, laying down that it is the bounden duty and obligation of the Court to neutralize any unjust enrichment and undeserved gain made by anybody by invoking the jurisdiction of the Court and that when a party applies and gets a stay or injunction from the Court, it is always at the risk and responsibility of the party applying, and an order of stay cannot be presumed to be conferment of additional right upon the litigating party;

(iv) that the challenge by the appellants to the demand for interest founded upon the interpretation of para 14 of the Drug (Prices Control) Order (DPCO), 1987 prima facie had no merit for the reason of the said demand having been upheld by the Supreme Court. The appellants were not found to have raised such challenge before the Supreme Court and it was held that the same would be of no avail;

(v) as far as reliance by the appellants on the judgment of a Single Judge of this

Court in Ranbaxy Laboratories Limited Vs. Union of India, W.P.(C) No. 9699-9700/2004 decided on 10th May, 2010, was concerned, it was held that it was yet to be seen whether the said judgment had any application to the facts of the present case especially in the light of the judgment of the Supreme Court;

(vi) it was also noticed that the appellants, prior to the writ petition of the year 1990, also had challenged the said demand and had obtained stay thereof.

4. The senior counsels for the appellants have before us contended:-

(a) that the demand dated 10th October, 2011 is issued in exercise of power under para 14 of DPCO, 1987 and para 12 of DPCO, 1995; that the learned Single Judge of this Court in Ranbaxy Laboratories Limited (supra) has held that the demand could not be made under DPCO, 1987. This question goes to the root of the demand;

(b) that the demand for interest @ 15% per annum is penal u/s 7A of the Essential Commodities Act, 1955 and not compensatory; the appellants have been agitating their bona fide rights; the challenge was first made in 1981 when the Government was directed to review the prices; the demand thereafter in the year 1986 was again challenged and which challenge also succeeded and the Government was again directed to review the prices; that the appellants in the writ petition of the year 1990 also had succeeded before this Court and thus the challenge by the appellants cannot thus be said to be frivolous or vexatious and was in bona fide exercise of their legal rights;

(c) that the Supreme Court has upheld the demand of the year 1990 prospectively only;

(d) that the appellants thus cannot be said to be in "default" within the meaning of Section 7A of the Essential Commodities Act and in which event only the claim sought to be enforced against the appellants for interest @ 15% per annum can be enforced;

(e) that the delay of 21 years in adjudication cannot be said to be attributable to the appellants and is attributable to the Courts and the appellants cannot be made to suffer therefore;

(f) that even now, the application of the appellants for clarification of the judgment dated 30th March, 2011 is pending before the Supreme Court and if the said clarification is allowed, the liability of the appellants for the principal amount also shall stand reduced and it is unjust to make the appellants pay interest in the interregnum;

(g) that no particulars/calculation of interest have been furnished by the respondents.

5. The learned Additional Solicitor General on behalf of the respondents appears on advance notice and with the consent of the counsels we have heard the matter finally.

6. The learned Additional Solicitor General had contended:-

- (i) that the prices under the Essential Commodities Act are fixed in public welfare;
- (ii) that the appellants during the pendency of the challenge to the demand had the option to, without prejudice to their rights and contentions, deposit the amount but chose to retain the same in their own pockets and now cannot be heard to controvert the demand for interest;
- (iii) that the argument of the appellants on the basis of para 14 of DPCO, 1987 is an argument on the merits of the demand and which has been rejected by the Supreme Court. Attention is invited to paras 23&24 of the judgment of the Supreme Court where reliance has been placed on Para 17 of DPCO, 1987 and it is contended that if Para 17 of the DPCO, 1987 applies, so would Para 14;
- (iv) that the Supreme Court has confirmed the demand, meaning that the demand of the respondents on the appellants in the year 1990 was valid. Axiomatically, it follows that non-payment is a "default" within the meaning of Section 7A of the Essential Commodities Act;
- (v) that the challenge in a Court does not necessarily make the challenge a bona fide one;
- (vi) attention is invited to the reply dated 16th May, 2011 sent by the appellants to the earlier demand for interest to contend that no challenge was raised to the demand for interest, save for contending that the application for clarification was pending before the Supreme Court;
- (vii) it is contended that computation of the demand for interest has already been furnished to the appellants as also noted by the learned Single Judge.
- (viii) With respect to the argument on the basis of the judgment in Ranbaxy Laboratories Limited (supra), it is shown that in LPA 576/2010 preferred thereagainst, vide order dated 16th August, 2010, the operation of the judgment of the learned Single Judge has been stayed;
- (ix) that the maintainability of the present appeal against discretion exercised by the learned Single Judge is also controverted;
- (x) reliance is placed on Assistant Collector of Central Excise, Chandan Nagar, West Bengal Vs. Dunlop India Ltd. and Others, observing that Governmental business cannot run on Bank Guarantees.

7. The senior counsels for the appellants in rejoinder have referred to Prem's Judicial Dictionary, 1992 Edition to contend that default connotes something wrongful and also on Stroud's Judicial Dictionary of Words and Phrases, 2008 Edition to contend that default is a failure and/or negligence. Attention is also invited to the judgment dated 30th May, 2011 of a Single Judge of this Court in Best Laboratories Pvt. Ltd. Vs. Union of India (UOI) and Others, laying down that interest u/s 7A of the Essential Commodities Act can be levied only for failure to

pay after the expiry of the date for payment and not earlier.

8. We may observe, at the outset, that since the writ petition is pending adjudication and this appeal is preferred against interim orders, we have examined the entire matter on the touchstone of prima facie view that is required to be taken at this stage and it is not the final view. Even the learned Single Judge has undertaken the exercise in that perspective only. Therefore the entire discussion which follows hereafter is tentative expression and will have no bearing on the outcome of the writ petition when it is heard on merits by the learned Single Judge. In the first instance, we are inclined to agree with the contention of the respondents that interference in the interim orders, which are essentially discretionary in nature, in appeal should be confined to cases where the discretion is shown to have been exercised arbitrarily, capriciously or perversely or where the Court has neglected the settled principles of law regulating grant or refusal of interlocutory injunctions. The Appellate Court will not interfere with the exercise of discretion by the Court of the first instance and substitute its own discretion merely because it may have arrived at a different conclusion. The Appellate Court is not to re-assess the material and seek to reach a conclusion different from the one reached by the Court below solely on the ground that if it had considered the matter at the initial stage, it would have come to a contrary conclusion. If the discretion has been exercised by the Trial Court reasonably and in a judicial manner, the fact that the Appellate Court would have taken a different view will not justify interference with the first Court's exercise of discretion. These principles laid down by Viscount Simon, L.C. in *Charles Osenton & Co. Vs. Jhanaton* 1942 AC 130 were accepted by the Apex Court in *The Printers (Mysore) Private Ltd. Vs. Pothan Joseph*, and reiterated in *Wander Ltd. and Another Vs. Antox India P. Ltd.*, and thereafter followed consistently in *Sonu Babu Bhambid and Others Vs. Dream Developers and Others*, , *Skyline Education Institute (Pvt.) Ltd. Vs. S.L. Vaswani and Another*, and *Purshottam Vishandas Raheja and Another Vs. Shrichand Vishandas Raheja (D) through L.Rs. and Others*, .

9. We are satisfied, for the following reasons in the present case that the discretion exercised by the learned Single Judge in refusing injunction to the appellants does not suffer from any of such fallacies requiring interference in appeal:-

(i) the appellants have already, once in the litigation qua the principal demand, enjoyed the benefit of the monies remaining in their pocket and cannot now litigate qua the demand for interest thereon also with the monies again in their pocket inasmuch as the same would raise the question of interest over interest in the event of the appellants again losing. On the contrary, in the event of the appellants succeeding in the writ petition, the monies so deposited by it with the respondents, subject to the outcome of the petition, can always be refunded to them;

(ii) we do not find any error in the finding of the learned Single Judge of the

appellants not having any prima facie case in their favour. On the basis of the contentions aforesaid of the appellants, we are unable to take any different view;

(iii) unless the appellants are made to pay the interest as demanded, they would, notwithstanding having lost in the legal battle qua the principal demand, emerge victorious. It is common knowledge that the return on investments in business and trade is much more than 15%. If the returns would not have been more, business/trades men would be satisfied with investing the monies in Banks, Financial Institutions or in Stocks. The appellants by retaining the monies for nearly 21 years, during when they challenged the demand therefore, continued to enjoy the benefit thereof. It can safely be presumed that the appellants by retaining the said monies earned several times over. They have now, by depositing the monies soon after losing in the Apex Court, discharged the liability which was to be discharged nearly 21 years ago;

(iv) the learned Single Judge is absolutely right in upholding that if the appellants were to be absolved from such liability, it would amount to using litigation as a weapon of oppression. The value of the monies received by the respondents exchequer after 21 years cannot be said to be the same as would have been, if received when originally due. The Supreme Court besides in *Indian Council for Enviro-Legal Action (supra)*, earlier also in *Abhimanyoo Ram Vs. State of U.P.* (2008) 17 SCC 73 and in *Ramesh Chandra Sankla Etc. Vs. Vikram Cement Etc.*, has held that the equities flowing from the interim orders ought to be balanced and a litigant cannot get the benefit of an interim order. The Supreme Court has deprecated the attempts by litigants to retain the benefits of interim orders and has held that the same are required to be dealt with sternly and has held that even in the absence of the departmental official praying for consequential directions cancelling / reversing the benefits flowing from the interim order, it is the bounden duty of the Courts to balance the equities;

(v) the interest in the present case is thus payable by the appellants also on the basis of principles of equity, honesty and fair play and to avoid any unfair advantage being gained by them by invoking the jurisdiction of the Court and for larger interest of justice;

(vi) the contention of the appellants that the delay in the earlier adjudication was not attributable to it, is immaterial. Such delays are implicit owing to the high volume of litigation before the limited number of Judges and a litigant ought to know of the same and cannot be heard to urge that it had anticipated disposal time of one year and not of ten years. If the litigants find themselves unable to pay interest for further delay being caused in adjudication, it is always open to them to place the money in an escrow account to stop the running of interest thereon;

(vii) the other ingredients of balance of convenience and irreparable loss prerequisite for grant of interim relief are also found to be lacking in the claim of the appellants. As aforesaid, the appellants have already once had the benefit of

retaining monies with themselves and the respondents are required to be compensated for the losses already suffered by them;

(viii) prima facie, we are unable to see as to how the appellants can save themselves from the applicability of Section 7A of the Essential Commodities Act and which requires the person liable to deposit the amount to the credit of the account and who "makes any default in paying or depositing the whole or any part of such amount" liable for interest as provided therein. The word default is used in Section 7A in the context of non-payment and irrespective of the plea of mens rea. The "default" referred to is in paying or depositing and not in refusing to pay or deposit so as to attract the plea of intent. The Supreme Court in *Dhan Singh Ramkrishna Chaudhari and Others Vs. Laxminarayan Ramkishan and Another*, though in the context of Section 25(2) of the Bombay Tenancy & Agricultural Lands Act, 1948 and found to be equally applicable to Section 7A of Essential Commodities Act also held that failure and default are synonymous terms; failure in the dictionary sense means "a falling short", a "deficiency" or "lack"; default means omission of that which a man ought to do. We therefore are of the view that the word "default" in Section 7A of Essential Commodities Act means nothing more, nothing less than not doing what ought to have been done as required therein. Honesty of intention, therefore, will clearly not prevent the failure to pay from constituting a default. Reference may also be made to the judgment of the Division Bench of this Court in *Birla Cotton Spinning & Weaving Mills Ltd. Vs. UOI* ILR (1984) 2 Del. 60 laying down that the word "default" in Section 14B of the Employees' Provident Funds & Miscellaneous Provisions Act, 1952 means failure in performance and that if the payment is not made by the date specified, there will be default. We are thus also satisfied as to the rate at which interest is claimed;

(ix) the Supreme Court recently in *Nava Bharat Ferro Alloys Ltd. Vs. Transmission Corporation of A.P. Ltd. and Another*, was faced with an identical situation. There also during the pendency of challenge to the Electricity Tariff, interim stay was granted, subject to furnishing Bank Guarantee. After the challenge eventually failed, the demand for amount becoming due for delay in payment was claimed. The same was again challenged and which challenge was negatived by the High Court. Before the Supreme Court, it was contended that the consumer could not be said to be in default of payment during the operation of the interim order in the earlier writ petition. The Supreme Court held that the consequence of non-payment having been provided, the same had to be enforced. It was further held that after the decision of the Court upholding the demand, the demand stood revived with full force with all its consequences, though it had remained unenforceable for some period on account of the orders of the Court. The principle of restitution was also invoked and it was held that the Court has to endeavour to ensure that a party who has suffered on account of an order that is finally reversed should be put back in the same position as far as may practicable, in which it would have been if the decision of the Court adversely affecting it had not been passed. In fact the offer of the defaulter in

that case to pay interest @ 18% per annum on the unpaid amount was rejected and the defaulter held liable to pay additional amounts as provided. It was yet further held that an erroneous direction of the High Court or the consumer being not deliberately in default on account of such erroneous decision will not affect such restitution.

(x) In another recent judgment *State of Rajasthan and Another Vs. J.K. Synthetics Ltd. and Another*, the Supreme Court enhanced the rate of interest for the period of interim protection in the earlier round of litigation to 18% per annum and 24% per annum. It was also held that where the statute or contract specifies the rate of interest, usually interest will have to be paid at such rate unless there are special reasons for not doing so, as any other interpretation would encourage unscrupulous debtors to file writ petitions and make attempts to obtain interim orders of stay. It was further held that if the obligation, to make restitution by paying appropriate interest on the withheld amount is not strictly enforced, the loser will end up with a financial benefit by resorting to unjust litigation and winner will end up as the loser financially for no fault of his.

10. We therefore do not find any merit in the appeal and dismiss the same. No order as to costs.