(1996) 01 AHC CK 0108

In the Allahabad High Court

Case No : C.M.W.P. No. 2007 of 1990

Hindalco Industries Ltd. and Others APPELLANT

Vs

State of U.P. and Others RESPONDENT

Date of Decision : 10-01-1996

Acts Referred:

Constitution of India, 1950 — Article 142, 226
Uttar Pradesh Electricity (Duty) Act, 1952 — Section 10, 3, 3(1), 3(4), 4
Uttar Pradesh Electricity (Duty) Rules, 1952 — Rule 10, 11, 8, 8(1)

Citation : (1996) 01 AHC CK 0108

Hon'ble Judges : Palok Basu, J;D.C. Srivastava, J

Bench : Division Bench

Advocate : N.B. Singh, K.K. Venugopal and Raja Ram Agarwal, for the Appellant; Addl. A.G. and Addl. Chief S.C., for the Respondent

Final Decision : Allowed

Judgement

Palok Basu, J.—This writ petition under Article 226 of the Constitution of India has been filed by M/s. Hindalco Industries Ltd.; (2) M/s Renusagar Power Company Ltd.; (3) Rajendra Kumar Kasliwal; and (4) Devki Nandan Himmatramka in which the four opposite-parties are; (1) The State of Uttar Pradesh; (2) The Secretary, Government of Uttar Pradesh, Department of Energy; (3) The Asst. Director, Electrical Safety, Government of Uttar Pradesh, Mirzapur Zone; and (4) The Collector, Sonbhadra. U.P.

2. The prayer contained in the writ petition is that the impugned orders passed by the Respondents be quashed by issuing a writ in the nature of mandamus or an appropriate writ. Those orders have been detailed in paragraph 1 of the petition, which culminated in the order dated 12th September, 1989 whereby a sum of Rs. 24,42,49,029.50 has been determined payable as interest on electricity duty paid by Petitioner No. 1.

3. Before dealing with the question involved, it may be mentioned that on behalf of the Petitioners Sri K.K. Venugopal, Senior Advocate with his immaculate

advocacy and Sri Raja Ram Agrawal, Senior Advocate with his captivating arguments have desired the Court to go with them. The facts and circumstances of the case, however, have to be noted in detail in order to Judge how much and how far those arguments can be sustained. It must be at once stated that Sri Rakesh Dwivedl, Additional Advocate General, assisted by Sri Pradeep Kumar, Additional Chief Standing Counsel, has argued with ability for the opposite-parties. The result, therefore, is that a very heavy duty has been cast upon this Court to deal with the respective contentions.

4. Though elaborate arguments have been advanced concerning the liability of a citizen or an authority to pay tax as payable under taxable statute, it was seriously challenged that interest payable under certain provisions of those enactments could be levied and demanded inspite of Court''s stay orders being operative during the period for which interest on tax/duty is demanded. It was argued that the litigation should be taken to have ended after the Petitioners paid a sum of Rs. 15,78,54,261,85 as electricity duty within the time allowed and thereafter the demand of interest made by the Respondents through the impugned order dated 12.9.1988 amounts to reopening the proceedings which became final after the Supreme Court judgment dated 28.7.1988 and, therefore, the demand of interest is wholly illegal. In order to decide the issues involved in this writ petition, the legislative history, the factual history and the litigative history, all these three are to be taken up and considered simultaneously so that correct conclusions may be arrived at.

5. To start with the legislative history, it may be pointed out that in the State of Uttar Pradesh, there is an Act known as U.P. Electricity (Duty) Act, 1952 (the Act). By Section 3 thereof, it has been provided that subject to the provisions of the said Act, there shall be levied for being paid to the State Government on the energy a "duty". Three categories have been named to attract the liability of payment of duty. Clause (a) of Sub-section (1) of Section 3 categorises where the energy is sold to a consumer by a licencee, the Board, the State Government or the Central Government, Clause (b) categorises those where energy is consumed by a licensee or by the Board in or upon premises used for commercial or residential purposes etc. Clause (c) categorises persons where energy is consumed by "any other person" from his own source of generation.

6. It may be mentioned that Sub-section (4) of Section 3 empowers the State Government to grant exemption from the payment of duty as leviable under Sub-section (1).

7. Section 4 lays down that the electricity duty shall be paid in such manner and within such period as may be prescribed. Sub-section (2) thereof says that where the amount of electricity duty is not paid to the Stale Government within the prescribed period as aforesaid, the licensee, the Board or other person mentioned in Clause (c) of Sub-section (1), as the case may be, shall be liable to pay within such period as may be prescribed, "interest at the rate of eighteen per cent per annum" on the amount of electricity duty remaining unpaid until

payment thereof is made.

8. Section 5 of the Act talks of the records and returns to be maintained, of the manner in which they have to be filed. Section 6 provides for appointment of the Inspecting Officers and then Section 7 has provided the mode of recovery, etc., of electricity duty. Penalty is leviable u/s 8 and when it comes to taking of cognizance of offences, Section 8A lays down the mode thereof and 8B provides how to deal with the offences by the Company and likewise 80 protects all action taken in good faith.

9. Section 9 stood omitted by U.P. Act No. 2 of 1971. This mention of omission is purposive because the conditions for exemption have been incorporated by Section 4 through the aforesaid amendment in the Parent Act. Section 10 empowers the State Government to frame rules.

10. Under the rules, it is provided that when the energy is consumed "by other person", the other person, shall within two calendar months following the close of the month in which meter readings were recorded, deposit in Government Treasury under the head XIII other taxes and duties...", the amount of duty payable in every month on the energy recorded under Sub-rule (1), and shall submit to the Assistant Electrical Inspector concerned the receipted copy of the treasury challan, under intimation to the Electrical Inspector, so as to reach him within 10 days of the expiry of the aforesaid period of two months. Rule 8 provides for submission of retuns. Interest @10% is chargeable if duty is not paid, Simultaneously powers having been conferred on Inspecting Officer by Rule 10 and Rule 11 concerning inspection of records, etc. The entire Act was proposed to be appended as Appendix to this judgment but since relevant provisions of the Act and the Rules have been noted above, it is no more necessary to have it as an appendix.

11. To complete now the legislative history, it may be pointed out that in the erstwhile Section 9 there existed a provision under which complete exception could be claimed. When the aforesaid Section 9 was deleted, simultaneous amendments were brought about in Section 3 of the Act, which again were subsequently amended by U.P. Act No. 8 of 1975. It may be mentioned here that though one would have desired to go into all the amendments chronologically in order to know the exact effect of all the amendments, but suffice It to say that after the decision of the Hon''ble Supreme Court, in Civil Appeal No. 2966 of 1986, the parties to this litigation as well as even this Court, have only to refer to the findings recorded therein with a view to judge how far it is permissible for the Respondents to demand interest from the Petitioners on the duty which they have paid within the time allowed by the Hon''ble Supreme Court.

12. Coming to the litigative history and the factual history together, the Petitioners challenged the levy of duty through demand notice dated 30th December, 1971 in this Court by Writ Petition No. 368 of 1972 on 20th January, 1972. At the time of admission of this petition, an interim order was passed

staying in the meantime the demand of duty made through the said notice dated 30th December, 1971. However, on 21st March, 1972 the exemption application of Hindalco was rejected. Then the said writ petition was initially amended which was ultimately withdrawn and a fresh writ petition No. 4521 of 1972 was filed in which the order dated 16th June, 1970 whereby the exemption was refused, was also challenged. It may be mentioned that the recovery of duty demanded from the Petitioner was stayed after the petition was admitted by a Division Bench of this Court on 27.7.1972.

13. It may be mentioned here that by an order of the State Government, a relaxation was made regarding payment of duty for those who generated through their own sources and such a notification was issued on 17th March, 1973. Be that as it may, the aforesaid Writ Petition No. 4521 of 1972 stood allowed by this Court on 17th May, 1974. The Respondents filed a SLP before the Hon''ble Supreme Court against the judgment, which was rejected on 28th March, 1977.

14. It may be mentioned that by the aforesaid judgment of this Court dated 17.5.1974, a proper hearing was directed to be extended to the Petitioners in considering the exemption application. However, by its order dated 16th February, 1982, the exemption aplications of Hindalco dated 28th September, 1970 and 6th September, 1975 were rejected.

15. On 3rd March, 1982, the State Government demanded Rs. 11,96,83,153,80 as electrical duly for the period 1.9.1970 to December, 1981. At this stage begins the second inning on the part of the Petitioners, who came with Writ Petition No. 3921 of 1982, to be specific it was the order of 16th February, 1982 and also the demand notice dated 3rd March, 1982 which became the subject matter or challenge in this Writ Petition No. 3921 of 1982.

16. On 26th September, 1984 Writ Petition No. 3921 of 1982 was allowed inasmuch as the demand made through the notice dated 3rd March, 1982 was also quashed. It was directed that the exemption application of the Petitioners should be re-considered keeping in view the observations in the earlier judgment dated 17.5.1974 as well as in the judgment dated 26th September, 1984 (since this judgment is reported in 1985 ALJ 250).

17. It is this judgment which was carried to the Hon''ble Supreme Court by the Respondents which ultimately had been decided by the Hon''ble Supreme Court on 28th July, 1988.

18. Before proceeding further with the arguments, it may be mentioned that in this Court till about three days of the hearing of the case, the Court proceeded assuming that what is contained in paragraph 24 of the paper book, quoting the interim order of the Apex Court was correct. It may be mentioned that paragraph 24 quotes the Supreme Court''s interim order as under:

List the matter on the first Tuesday of August 1986 for Final hearing. Proceeding pursuant to the order of demand are stayed. (Emphasis added).

19. On a close scrutiny of the facts particularly emanating from the judgment of this Court dated 26th September, 1994, a question was put to the counsel for the Petitioners as to whether the interim order quoted in paragraph 24 was a correct re-production or not. What was written as "demand" should have been "remand" as per observations of this Court. At this, the learned Counsel for the Petitioners filed a supplementary affidavit sworn by Sri Suresh Chandra, alleging himself to be General Manager (Administration), Hindalco Industries Ltd. along with which a typed copy of the order of the Hon''ble the Supreme Court dated 21st April, 1986 has been annexed as Annexure-I, which reads as under:

List the matter on the first Tuesday of August, 1986 for final hearing. Proceeding pursuant to the order of remand are stayed. (Emphasis by the Court).

20. Therefore, the position is that this Court''s doubts were correct. The word ''remand'' was wrongly written as ''demand'' and one does not know if the correct order had been quoted, whether any stay order at the time of admission of this petition would have been passed or not. However, the fact is that Supreme Court did not stay realisation proceedings by its order while admitting the Special Leave Petition. In other words, Petitioners liability to pay the duty after the judgment dated 26.9.1984 was not stayed by the Supreme Court.

21. On the aforesaid legislative, factual and litigative history, the only question which now remains to be determined is as to whether the Petitioners can ever say that after the order of 26th September, 1984, they had any interim order by any court. If it is held that the Petitioners could claim benefit of the interim order till 26th September, 1984, till which date admittedly they had one, all other questions decided by the Supreme Court''s judgment, will not be permissible for this Court to go into. Similarly, if it is held that even if there was a stay order prior to 26th September, 1984, the learned Respondents counsel''s argument that the aforesaid stay order cannot permit them to have any advantage, then alone the question as to whether claim of bona fide dispute, etc., will have to be decided concerning the period even prior to 26th September, 1984.

22. To cut short the entire controversy, let it be emphasised once again that the first and the second innings of the litigation in this Court concerned one and the same claim of exemption of the Petitioners from payment of duty u/s 3 of the Act. In order, therefore, to examine how far the Petitioners and the Respondents are bound by what facts and findings whereon stand determined by the judgment dated 26th September, 1984, reference may be made to the narration of facts contained in paragraph 61 of the said judgment. Simultaneously, the observations of Hon''ble Supreme Court, as recorded in paragraph 70 of the aforesaid judgment dated 26th July, 1988 have to be noted side by side in order that line of demarcation be drawn beyond which parties cannot travel. These findings are quoted here:

61. Shri Ray, learned Counsel for the Petitioners challenge the validity of the

demand notice on two grounds. Firstly, he urged that even assuming that electricity duty was payable by the Petitioners, the Respondents are entitled to realise duty at the rate of 1 paisa with effect from 1.9.1970 on the power supplied by the first and second units of Renusagar, but the impugned demand notice includes demand from the Petitioners at the rate of 2 paise per unit which is not permissible. Secondly, the third unit of Renusagar was commissioned on 2.11.1981 and the power generated by that unit and supplied to Hindalco is exempt from electricity duty in pursuance of the Government Notification dated March 17, 1973. 70. In the aforesaid view of the matter we are of the opinion that consumption of energy by Hindalco is clearly consumption by Hindalco from its own source of generation. Therefore, the rates of duty applicable to own source of generation have to be applied to such consumption, that is to say, 1 paisa per unit for the first two generating sets and nil rate in respect of third and fourth generating sets. It is appropriate to refer that having regard to the conduct of the State the power cuts matter and also the present proceedings the State should not be permitted to treat consumption of Renusagar''s energy by Hindalco as anything other than (sic or) different from consumption of energy by Hindalco from its own source of generation. We are, therefore, of the opinion that in the facts of this case the corporate veil must be lifted and Hindalco and Renusagar should be treated as one concern and if that is taken the consumption of energy by Hindalco must be regarded as consumption by Hindalco from its own source of generation.

23. In view of the afroesaid statements of fact contained in paragraph 61 of the judgment, it has to be held beyond doubt that the Petitioners admitted the liability of payment of duty at the rate of one paisa per unit with effect from 1.9.1970. It is precisely this which has been held by the Supreme Court as the liability of the Petitioners.

24. Let it be mentioned here incidentally that the alleged controversy as to whether the Petitioner Renusagar should be held liable to pay or the Petitioner Hindalco should be held liable to pay stands also clarified by the Supreme Court in the sense that if "the corporate veil was lifted Hindalco and Renusagar have to be treated as one concern".

25. Some of the authorities cited at the bar may be noted here for ready reference. These are not only concerning the applicability of principles of res judicata, but also decide that if a point in litigation has reached the stage of finality at an earlier stage, the said decision would operate "res judicata" at a later stage of the said litigation so far as that point in concerned.

26. In Satyadhyan Ghosal and Others Vs. Sm. Deorajin Debi and Another, , it has been held that "when a matter whether on a question of fact or a question of law has been decided between two parties in one suit or proceeding and the decision is final, no party will be allowed in a future suit or proceeding between the same parties to canvass the matter again...The principle of res-judicata applies also as between two stages in the same litigation to this extent that a court, whether the

trial court or a higher court having at an earlier stage decided the matter in one way will not allow the parties to retaliate the matter again at a subsequent stage of the same proceeding."

27. In Prahlad Singh Vs. Col. Sukhdev Singh, . the aforesaid decision has been followed and it was held that the finding in the earlier proceeding that the landlord had agreed to withdraw the suit and receive the rent from the tenant, was binding at the later stage of the same proceedings.

28. The other set of rulings relate to the twin points--"bona Jide-dispute" if pending does not continue the liability to pay tax on interest or surcharge etc. under a taxing Statute and,--any stay order of Court would not stop the liability to pay the tax on interest or surcharge. It does not appear necessary to hold detailed discussion on each of them for the real controversy is to be approached and decided little differently. However, some of these cases are:

(i) AIR 1973 SC 137. Haji Lal Mohammad.

(ii) AIR 1966 SC 1454. State of Rajasthan v. Ghasi Lal

(iii) 15 ITR 302, Chatturam.

(iv) J.K. Synthetics Limited and Birla Cement Works and another Vs. Commercial Taxes Officer, State of Rajasthan and another, .

(v) 1992 AU 237.

(vi) AIR 1961 SC 552.

(vii) Shroff and Co. Vs. Municipal Corpn. of Greater Bombay and Another, .

(viii) Laxmikant Revchand Bhojwani and Another Vs. Pratapsing Mohansingh Pardeshi Deceased through his Heirs and Legal Representatives, .

(ix) 1995 STI 75.

(x) Bakul Cashew Co. and Others Vs. Sales Tax Officer Quilon and Another, .

(xi) Dr. Indramani Pyarelal Gupta Vs. W.R. Nathu and Others, .

(xii) Income Tax Officer, Alleppey Vs. M.C. Ponnoose and Others, .

(xiii) Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, .

(xiv) Hajilal Mohammad Bidi Works, Allahabad Vs. The State of U.P. and Others, .

(xv) Ferro Alloys Corpn. Ltd. Vs. A.P. State Electricity Board and another, .

29. It was vehemently argued by Sri Rakesh Dwlvedi that the interim order granted by this Court cannot be made the basis of a "bona fide claim" and he relied upon various decisions of this Court and of the Supreme Court also. It may, however, be mentioned that while the Petitioners? claim of exemption was

one independent action, the issuance of the demand notice by the Respondents was another independent action. It had already been held by the State Government on two earlier occasions that they should charge the Petitioners u/s 3(1)(a) of the Act. This point has been set at rest by the aforesaid judgment of the Supreme Court dated 28th July, 1988, the relevant paragraphs should be quoted here for ready reference:

93. In the premises, the High Court was in error in setting aside the order of the State Government in its entirety. The High Court should have allowed the claim of Hindalco for the reduced rate of bill on the basis that Renusagar Power Plant was its own source of generation u/s 3(1)(c) and the bills should have been made by the Board on that basis. But the High Court was in error in upholding the Respondents'' contention that the State Government acted improperly and not in terms of Section 3(4) of the Act and in violation of the principles of natural Justice. We, therefore, allow the appeal to the extent indicated above and set aside the judgment of the Allahabad High Court to that extent and restore the State Government''s impugned order subject to the modification of the bills on the basis of one source of generation. We, therefore, direct that the electricity bills must be so made as to give Hindalco the benefit of the rate applicable to its own source of generation from Renusagar plant.

94. The appeal is disposed of in those terms. The electricity bills must be computed as indicated above. After recomputation and presentation of such bills the Respondents will pay the same within two months thereof.

30. Having noted the aforesaid findings creating liability of Petitioners only to the extent of paying "duty" in accordance with the rate applicable u/s 3(1)(c) and not u/s 3(1)(a) as always demanded by Respondents, and having also noted that interim orders of this Court till 26.9.1984 were operative, the liability, if any, of the Petitioners to pay "interest" u/s 4 of the Act has to be determined.

31. It is, therefore, beyond controversy now that the liability to pay arose only u/s 3(1)(c) and there was no liability on the part of Hindalco or Renusagar to pay electricity duties u/s 3(1)(a). The question, therefore, arises as to whether the department can legitimately argue, as has been vehemently argued by Sri Dwivedi, that the Petitioner should have followed the self-assessment procedure all through the period of controversy beginning from 1970 up to date. There is inherent fallacy in the aforesaid argument. Once a demand was made under a clause which had been finally adjudicated to be inapplicable, the Petitioners? right to challenge the same should be upheld. Once this was done, the Petitioners succeeded ultimately before the Hon''ble Supreme Court and got an order in their favour that liability to pay duty was only u/s 3 (1)(c) and there was no liability to pay u/s 3(1)(a) as demanded by the Respondents.

32. Taking the aforesaid factors into considertion, it is not possible to uphold the argument of the Respondents that the Petitioners were duty bound to clear off the liability of payment of duty u/s 3(1)(a) and now demanded by Respondents

from the date 1.9.1970 upto the date of demand. The liability had and has to be reduced after applying basic rate applicable u/s 3(1)(c).

33. Equally difficult it is to uphold the argument of Petitioners? counsel that the Supreme Court judgment having required the Respondents to serve upon the Petitioners a demand notice, for payment of duty, therefore, until service of such demand notice, no question of paying duty arose. And, the argument that for the said reason, no liability to pay interest arose is equally falicious. This is exactly where justice is called upon to balance the scales. If the Supreme Court had granted stay order, what may have been the position, is not necessary to speculate. The fact is that there was no interim order after 26th September, 1984. Therefore, the liability of the Petitioners to pay the duties with effect from 26th September, 1984 up to date u/s 3(l)(c) is undeniable. The Petitioners knew what they fought for, the Petitioners knew what the decision of the Supreme Court was and the Petitiones also knew that there was no more a stay order in their favour. Therefore, an attempt to escape payment of duty even after 26th September, 1984 has to be condemned in the strongest terms. The Petitioners? own admission and then the finding of this Court and of the Hon. Supreme Court noted above made the liability to pay the duty u/s 3(1)(c) absolute. There was no escape. In fact, rightly the Petitioners deposited the "duty" amounting to Rs. 15,78,54,261.85 by 22.10.1988 against the revised demand notice dated 17.10.1988 by the Respondents. Thus the Petitioners demonstrably knew their liability after 26.9.1984 and self assessment procedure was attracted with effect from 26.9.1984. Therefore, self-assessment procedure as is prescribed under the Act and Rules did cast a duty upon the Petitioners to go on depositing regularly the entire "duty" payable with effect from 26th September, 1984. The liability to clear off the arrears in pursuance of the Supreme Court order is distinct and separate from the liability of payment of duty payable from 26.9.1984.

34. Interestingly, it may be mentioned that learned Counsel for the Petitioners have vehemently argued that the demand of interest is in the teeth of the direction of the Supreme Court. Shri Venugopal urged that the Supreme Court did not direct payment of interest. He further argued that the Respondents had raised the question of interest liability. Therefore, it should be presumed that the Supreme Court did not accept the liability of interest. Reliance was placed on the decision of Supreme Court in The Direct Recruit Class-II Engineering Officers'' Association and others Vs. State of Maharashtra and others, . It was also argued that the Supreme Court''s final directions should be taken to have been passed in exercise of powers conferred upon it by Article 142 of the Constitution of India. Reliance was placed on 1994 SCC (1) 44. It was further argued that "interest" became a public debt and since in the SLP some reference of liability was raised, the absence of any specific direction about that point by Supreme Court prohibits the Respondents from claiming interest after the principal duty stood paid as per direction of the Hon''ble Supreme Court.

35. It may be pointed out very humbly that the question of payment of interest

was never raised. It could not have been raised either unless the liability to pay duty was first determined. While this Court held that exception application has to be re-heard and therefore, quashed the demand notice also, the Supreme Court held that there was full compliance of the principles of natural justice and exemption had rightly been refused to the Petitioners and their liability to pay duty u/s 3(1)(c) was confirmed and, therefore, asked the Respondents to furnish an amended bill. Furnishing of amended bills as per Supreme Court''s orders does not mean that the Petitioners? liability to pay the admittedly payable duty had ended.

36. As rightly argued by Sri Dwivedi, self-assessment procedure has not been the subject matter of any decision so far. There is no decision indicating whether the payment of electricity duties may or may not be held to be payable under self assessment clauses if there was a stay order of High Court operating. It is true that some of the decisions mentioned above Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, , relate to the penalty and surcharge payable under some or the other of the taxing statutes and reference has already been made above to those decisions cited from both the sides. A combined reading of the provisions of the Act and the Rules leads to the conclusion that the words "not paid" concerning duty payable must refer to voluntary inaction in not paying the admitted dues. There should not be any doubt about payability. In a matter where arguable points are raised and the realisation of duty is stayed by High Court, that litigant cannot be marked as having "not paid" the duty. The payability in such cases stands checked. Once the principal duty is made not realisable by a stay order, it is impossible to hold that liability to pay interest accrued due to said nonpayment. Moreover, to some extent the observations made by the Supreme Court in J.K. Synthetics as also in two other decisions support the Petitioners? argument to the extent that they can claim protection of the interim order till 26th September, 1984 up to which date the Interim order was operative.

37. In view of the aforesaid discussions, the writ petition partly succeeds. The demand of interest for delayed depositing of electricity duty payable for the period September. 1970 to May, 1988 as demanded by letter dated 1.12.1989 is directed to be modified within two weeks from today so as to claim interest from the Petitioners at the permissible rate from 26th September, 1984 on the amount of duty payable till that day as they are not liable to pay interest on the amount of duty payable by them up to 26th September, 1984. The Petitioners are directed to deposit the interest amount within two months of the service on amended notice of demand. The parties will bear their costs.

