
(2004) 08 RAJ CK 0054

In the Rajasthan High Court

Case No : Civil Writ Petition No. 1655 of 1997

Manoharlal and Party

APPELLANT

Vs

Excise Commissioner

RESPONDENT

Date of Decision : 25-08-2004

Acts Referred:

Constitution of India, 1950 — Article 226
Rajasthan Excise Act, 1950 — Section 30AA, 9A, 9A(1)

Citation : (2005) 2 RLW 826

Hon'ble Judges : S.K. Keshote, J

Bench : Single Bench

Advocate : R.P. Garg, for the Appellant; R.B. Mathur, for the Respondent

Final Decision : Dismissed

Judgement

S.K. Keshote, J.—The matter is placed for Orders on the second stay application but looking to the fact that the matter is of the year 1997 and that a short controversy is involved therein, the writ petition itself is taken up for final hearing with the consent of the, learned counsel for the parties.

2. In the writ petition, the petitioner prayed for quashing and setting aside of the Order dated 31 st of January, 1997 Annexure- 11, the Order of the respondent. Under this Order the respondent dismissed the application filed by the petitioner for waiver of interest payable on the guarantee amount. The respondent declined to grant the prayer made for waiver of interest on the ground that the petitioner refused to pay the principal amount of guarantee.

3. The second prayer made by the petitioner is for issue of a direction to the respondent not to recover any amount from him in relation to Bundi-Hindoli Group of Shops for the Excise License 1995-96.

4. Third prayer made is for quashing of the action of the respondent by which the amount deposited by him against the principal amount has been later on shown to have been adjusted against interest amount and for declaration thereof null

and void.

5. Shri R.B. Mathur, the learned counsel for the respondent, raised a preliminary objection that the writ petition is not maintainable on the ground of availability of efficacious alternative remedy in the matter to the petitioner. He made reference to Section 9-A of the Rajasthan Excise Act, 1950 (hereinafter shall be referred to as "the Act, 1950").

6. The facts of the case emerge from the memo of writ petition are that excise license was issued by the Excise Department of Bundi-Hindoli Group for the year 1995-96 for Rs. 5,97,06,500/- and for Nenwa Group of shops for Rs. 1,17,00,000/- in the name of petitioner.

7. The petitioner alleged that since the date of grant of excise license, the Administrative authority of the respondent Department at Bundi and the Police did not allow the excise shops to run and created number of hindrances in running thereof. It is stated that the police authorities of the District involved the salesmen of the petitioner in false cases and humiliated by arresting them. The police authorities also alleged to have seized the excise articles of the petitioner on number of occasions and Ordered to close the shops. It is further stated that the respondent Department Ordered to change the location of the excise shops and sub-shops notified at the time of grant of licenses and also not approved the locations of the new shops in spite of efforts made by the petitioner. As a result of these alleged illegal activities of the respondent and the police department the petitioner could not stand to his commitment to deposit the license fees in time. The license period came to an end on 31st of March, 1996. The case of the petitioner is that he deposited entire amount of exclusive privilege with the respondent Department and not a single penny of the principal amount in relation to license fees for the year 1995-96 of Bundi- Hindoli Group of Shops remained due against the petitioner. The petitioner grievance that despite of the fact narrated above the respondent Department, though it was not chargeable, made a demand of the interest of Rs. 12.87 lacs. He filed an application for waiver of interest amount; that has been rejected under the impugned Order and thus the writ petition.

8. The learned counsel for the petitioner submitted that the respondent Department has committed a serious error not to grant waiver of the interest.

9. It has next been contended that the ground given not to grant the prayer made by the petitioner in his application filed u/s 30-AA of the Act, 1950 is nonest.

10. Lastly it is contended that the entire amount of the exclusive privilege has been deposited and the action of the respondent Department to take it out from that head and the same could not be adjusted retrospectively against the interest.

11. As regards to the preliminary objection raised by the learned counsel for the

respondent Department re maintainability of the writ petition on the ground of availability of efficacious alternative remedy, Shri R.P. Garg, the learned counsel for the petitioner, submitted that the petitioner has no efficacious alternative remedy in the matter. In his submission the remedy of appeal provided u/s 9-A of the Act, 1950 is illusory and in fact not a real and effective remedy. An onerous condition has been put on the right of appeal of depositing of the amount of demand.

12. Shri R.B. Mathur, the learned counsel for the respondent Department, submitted that the petitioner made default in payment of monthly installment of exclusive privilege license fees and thus thereon interest has been accrued. It is a right of the respondent Department first to adjust the amount deposited by the petitioner against the accrued interest amount, on the default in payment of installment and, if any balance remains, then to adjust the same against the principal amount. Shri Mathur urged that the petitioner not deposited the entire due of the exclusive privilege license fees. The respondent Department is perfectly legal and justified not to exercise its discretionary power and thereby to waive the interest.

13. In reply to the arguments advanced by the learned counsel for the petitioner on the preliminary objection, Shri Mathur submits that validity of Section 9-A of the Act, 1950 has not been challenged by the petitioner. That apart, in his submission, in the matter of tax and fees due there may not be any constitutional hurdle in the way of the Legislative Assembly to provide, to the defaulter, the right of appeal on the condition of deposit of the amount.

14. I have given my thoughtful and anxious consideration to the rival contentions made by the learned counsel for the parties.

15. Section 9-A (b) of the Act, 1950 provides that an appeal shall lie to the Division Bench of the Board of Revenue established under the provisions of Rajasthan Land Revenue Act, 1956 (Act No. 15 of 1956), from any Order passed by the Excise Commissioner under this Act otherwise than on appeal

16. The learned counsel for the petitioner does not dispute that the Order passed by the Excise Commissioner u/s 30-AA of the Act, 1950 is appealable. His grievance is that it is not real and effective right of appeal.

17. An appeal u/s 9-A of the Act, 1950 is entertained only where it is accompanied by a satisfactory proof of payment of 75% of the amount of the demand created by the Order appealed against.

18. Having gone through the entire writ, petition and keeping in view the fact that the learned counsel for the petitioner also does not dispute that the validity of the provision of Section 9-A of the Act, 1950 has not been challenged by the petitioner in the writ petition, the contention of Shri R.P. Garg, the learned counsel for the petitioner, that right of appeal is only illusory or ineffective or subject to onerous conditions, is of little help to him.

19. In para No. 11 of the writ petition the petitioner made deliberately and purposely a wrong statement of fact. The remedy of appeal though was available u/s 9-A of the Act, 1950, still the petitioner made a statement on oath that against the impugned Order he has no other equally efficacious alternative and speedy remedy except to file the writ petition. The contents of para 11 of the writ petition are verified by the petitioner on affidavit in support of the writ petition to be true and correct on the basis of his personal knowledge.

20. There cannot be two views that when a right or liability is created by a statute, which itself prescribe me remedy or procedure for enforcing a right or liability, resort must be had to that particular statutory remedy before seeking discretionary remedy under Article 226 of the Constitution of India. It is true that Rule of exhaustion of statutory remedies is no doubt a Rule of policy, convenience and discretion and the Court in the exceptional cases issue a discretionary writ of certiorari. Where there is complete lack of jurisdiction for the officer or authority or Tribunal to take the action or there has been a contravention of fundamental rights or there has been a violation of Rules of natural justice or. where the Tribunal acted under a provision of law, which is ultra vires, then, notwithstanding the existence of an alternative remedy, the High Court can exercise its jurisdiction to grant relief. It is not a case hero. Where the litigant had statutory remedy of assailing the Order under the Statute thereunder the right of appeal is provided for certain conditions like limitation, payment of court fee or deposit of some amount or fulfillment of some other conditions for entertaining thereof, the Court to discourage the litigant to directly comes against the Order of the subordinate court, Tribunal or the Officer or Authority, Where in such matter the writ petition is entertained under Article 226 of the Constitution it may enable the litigant to defeat the provision of Statute which may provide for certain conditions for filing of the appeal. The petitioner deliberately and purposely and for his own benefits i.e. to avoid deposit of the amount of demand made has chosen the forum under Article 226 of the Constitution of India to challenge the Order of the respondent Department. It is not permissible. Thus I am satisfied that the writ petition deserves dismissal on the ground of availability of alternative remedy in the matter to the petitioner.

21. On merits also, after having heard learned counsel for the parties, I am satisfied that the petitioner has no case.

22. In para 4 of the writ petition the petitioner made in unequivocal terms an admission that he could not deposit the installments of exclusive privilege license fees in time. He made the application/representation from time to time for extending the time for depositing the amount of installments and have deposited the same in extended time. The petitioner has not produced any material to show that extension was granted to deposit the amount of installments waiving the condition of charging the interest thereon. The learned counsel for the petitioner further failed to point out any material on the record to show that the Department has ever waived the payment of interest on the amount delayed

deposited of installments. While granting the extension of time to deposit the amount, of which default was made, the petitioner has not been relieved of making the payment of interest.

23. The learned counsel for the petitioner does not lay finger on any provision under the Act, 1950 where it is provided that the amount deposited by the petitioner/licensee is first to adjust against due principal amount of exclusive privilege license fees though the default has been made in payment thereof and thereon interest is payable. In the absence of any provision to this effect in the Act, 1950 and in principle, the amount deposited first is to be adjusted against the due amount of interest on the installment in deposit thereof default has been made by the petitioner. Though I do not find any material on the record but even if we proceed with as what it is alleged by the petitioner that the amount deposited by him was adjusted against the amount of exclusive privilege license fees, it was a mistake, a curable and rectifiable mistake and the respondents have a legal right to rectify it and it was rectified.

24. The ground given by the respondents not to grant the prayer made by the petitioner for waiver of payment of interest is perfectly legal and justified. The petitioner has not come up with clean hands before this Court. He is making all efforts and playing tricks so as to befool the department and public at large and ultimately to put loss to the public exchequer. It is not fair and honest approach.

25. That apart, in the facts of this case otherwise also I do not find any ground much-less a cogent and justified ground for grant of waiver of interest. It is not as of right which the petitioner can claim. The respondent Department and more particularly the officer to which the powers are conferred u/s 30-AA of the Act, 1950 should be very careful, cautious and concerned to see that same is not lightly and casually exercised. Whatever the benefits granted under this Section are at the cost of the tax-payers and of the public exchequer.

26. As a result of the aforesaid discussion the writ petition fails and the same is dismissed.

27. On 2nd of May, 1997 the court granted stay Order in favour of the petitioner in the terms that coercive method for recovery of the impugned amount shall not be adopted by the respondent Department. As a result of the aforesaid stay Order granted by the court, the amount, of which demand was raised by the respondent Department against the petitioner, could not be realized. It is a case where under the interim Order the petitioner gains at the cost of public exchequer. The respondent could not make use of this amount. The public at large also suffered as the amount could not be utilized for its welfare. But for the court's Order the respondent could have realized the amount and the public would have been benefited. Thus, in any opinion, it is a fit case where the petitioner to compensate the respondent for the loss to the public exchequer.

28. There is yet another ground which justifies direction to the petitioner to make good the public loss and loss to the public exchequer. The petitioner has directly

come to this Court, though the statutory appeal is provided. At the cost of repetition the reference may have to the provisions of Section 9- A (1) of the Act, 1950. The appeal could have been entertained only on deposit of 75% of the amount of the demand created by the Order appeal against. To avoid this deposit the petitioner deliberately and purposely filed the writ petition. Had the course of appeal been adopted that would have resulted in receipt of 75% of the demanded amount in the public exchequer. For this purpose and object this condition to entertain the appeal has been provided by the legislature.

29. As a result of the interim Order passed by the court in favour of the petitioner restrained the State to recover huge money from the petitioner and thus resulted in substantial loss of the State revenue. There cannot be two view that interim Orders are always subject to final Orders passed by the court in the matter. The court has all the power at the final stage of the matter to correct or repair the loss caused by its stay Orders to the State exchequer. Time and again their Lordships of the Hon''ble Supreme Court gave a note of caution to the courts that it is inadvisable to make interim Orders which have affect of depriving the State (the people of State) of the revenues legitimately due to it. The court ordinarily not to take upon it, responsibility of staying the recovery of amounts due to the State unless a clear case of illegality is made out and balance of convenience is duly considered. In the case of excise contracts, generally speaking, it is well-high impossible to recover any arrears after the event. It is for this reason that the Rule of the State in the matter of excise contracts insists upon adequate deposits and securities beforehand to be adjusted towards the last month of the year. In the matter of demand of excise duties and non grant of interim relief/stay in favour of the contractor will not result in causing any irreparable injury to him which cannot be compensated in the terms of money. This is most and one of the important and relevant considerations which has to be kept in the mind while the court has to stay the recoveries of the demand of taxes.

30. In the case of Har Shankar and Others Vs. The Dy. Excise and Taxation Commr. and Others, their Lordships of the Hon''ble Supreme Court held that the writ jurisdiction of High Courts under Article 226 of the Constitution is not intended to facilitate avoidance of obligations voluntarily incurred. In the case in hand it is not in dispute that the petitioner has not made the payment of installments in time of guarantee amount. That apart in case where the petitioner has any grievance in the matter statutory remedial measure has been provided but subject to fulfillment of certain conditions, inter alia of depositing of 75% of the demanded amount of tax. Looking to the facts of the case I am satisfied that it is a fit case where the loss suffered by the State exchequer as a result of the stay granted in favour of the petitioner, is to be made good by the petitioner.

31. In the case of Shree Chamundi Mopeds Ltd. Vs. Church of South India Trust Association CSI Cinod Secretariat, Madras, their Lordships of the Hon''ble

Supreme Court held that as and when a party applies and obtains stay from the court of law it is always at the risk and responsibility of the party applies therefore and there passing of an Order of stay cannot be presumed to be the conferment of any additional right upon the litigating party. The said portion of the Order by the court means only that such Order stayed would not be operative from the date of its passing. The Order would not mean that the Order stayed had been wiped out from existence. The Order of stay granted pending disposal of a case comes to an end with dismissal of a substantive proceeding and it is the duty of the court in such cases to put the parties in the same position they would have been but for interim Orders of the court.

32. In the case of Kanoria Chemicals and Industries Ltd. and Others Vs. U.P. State Electricity Board and Others, , their Lordships of the Hon''ble Supreme Court held that grant of stay had not the affect of relieving the litigants of their obligations to pay late payment with interest on the amount withheld by them when the writ petition was dismissed ultimately. Holding otherwise as what their Lordships of the Hon''ble Supreme Court observed in (he case, would be against the public policy and the interest of justice. The petitioner but for the stay granted in the matter could not have retained this money and utilized the same. There he is benefited. He gained the benefits by utilizing the amount for his business or other purposes and it resulted in loss to the State exchequer.

33. The next question which arises for consideration is at what rate interest is to be awarded against the petitioner and in favour of the respondent Department. In the case of M/s. Upadhyay and Co. Vs. State of U.P. and Others, the Hon''ble; Supreme Court awarded Interest at the rate of 18% per annum. However in the case of M/s. Style (Dress Land) Vs. Union Territory Chandigarh and Another, the interest awarded by the High Court at the rate of 18% per annum was held to be excessive and was reduced to 15% per annum for the period of stay Order.

34. Thus in view of these two decisions of the Hon''ble Apex Court I am satisfied , that the interest at the rate of 15% per annum is just and reasonable, which is to be awarded to the respondent Department and against the petitioner. Accordingly the petitioner is directed to pay interest on the demanded, amount of Rs. 15,43,563/- at the rate of 15% per annum from the date of stay i.e. 25.1997 till the recovery thereof.

35. Consequent upon the, dismissal of the writ petition, the IInd stay application, filed therewith, does not survive and the same is also dismissed.