

(2016) 05 AHC CK 0062

In the Allahabad High Court

Case No : Civil Misc. Writ Petition (Tax) No. 809 of 2012

M/s Mohan Meakin Limited

APPELLANT

Vs

State of U.P.

RESPONDENT

Date of Decision : 27-05-2016

Acts Referred:

Uttar Pradesh Excise Act, 1910 — Section 28-A

Citation : (2016) 8 ADJ 107

Hon'ble Judges : Tarun Agarwala and Vinod Kumar Misra, JJ.

Bench : Division Bench

Advocate : Syed Faheem, Ahmad, Anurag Khanna, Dhruv Agarwal and Ms. Himadari Batra, Advocates, for the Appellant; C.S.C. and Avinash Chandra Tripathi, Advocate, for the Respondent

Final Decision : Allowed

Judgement

Tarun Agarwala, J.—By means of this writ petition, the petitioner has challenged the order dated 1st June, 2012 issued by the Assistant Excise Commissioner, Ghaziabad demanding a sum of Rs. 5,92,20,339.94 paise towards penal interest for late deposit of excise duty for the period September, 1963 to March, 1973.

2. The facts leading to the filing of the writ petition is that the petitioner is a Company engaged in the manufacture and sale of Beer and Indian made foreign liquor. The Excise Commissioner issued 10 orders between the period 28th June, 1963 to 24th November, 1973 levying an amount of Rs. 81,94,310/- as excise duty and fine on wastage of Beer in excess of 10% under Section 28A of the U.P. Excise Act, 1910 (hereinafter referred to as the Act). The petitioner, being aggrieved by the various orders, filed revisions before the State Government, which was dismissed on 12th April, 1978. The petitioner, thereafter, filed a bunch of writ petitions before the High Court, which was heard and allowed by a judgment dated 15th March, 2002. The writ Court held that the order of the Excise Commissioner demanding excise duty on wastage of Beer was

unwarranted and, accordingly, quashed the demand notices. The State of U.P., being aggrieved by the judgment of the High Court, filed a special leave petition before the Supreme Court, which was entertained and was converted into a civil appeal. The Supreme Court while admitting the appeal, rejected the application for stay of the judgment of the High Court. The Supreme Court eventually allowed the appeal of the State Government by judgment dated 23rd September, 2011 reported in 2011 (3) SCC 588 and quashed the judgment of the High Court. The Supreme Court held that the demand towards wastage of beer was justified.

3. Pursuant to the decision of the Supreme Court dated 23rd September, 2011, the petitioner deposited the demand of Rs. 81,94,310.20 paise on 3rd November, 2011. The petitioner thereafter received the impugned order dated 1st June, 2012 demanding penal interest amounting to Rs. 5,92,20,339.94 calculating penal interest at the rate of 18% per annum. The petitioner, being aggrieved by the said demand, has filed the present writ petition.

4. We have heard Sri Dhruv Agarwal, the learned Senior Counsel assisted by Ms. Himadri Batra, the learned counsel for the petitioner and Sri Avinash Chandra Tripathi, the learned Standing Counsel for the State.

5. The learned Senior Counsel contended that there is no provision for imposition of penal interest under the Act and, therefore, the demand was wholly illegal and liable to be quashed. Further, the provision of payment of interest was inserted under the Act by U.P. Act No.7 of 1985 with effect from 28th March, 1985. Consequently, no interest was payable for any demand prior to 1985. The learned Senior Counsel however urged that in any case, no amount was payable upto the date of the decision of the Supreme Court and, therefore, no interest was payable. The learned Senior Counsel submitted that the demand of the Excise Commissioner was quashed by the High Court and, consequently, no interest was payable from the date of the demand till the date of the order passed by the High Court and even, thereafter till the date of the order of the Supreme Court. The learned Senior Counsel contended that immediately after the decision of the Supreme Court and within the stipulated period as provided under Section 38A of the Act, the amount was paid within three months and, consequently, no interest was payable.

6. In support of his submission, the learned counsel has placed reliance upon various decisions, which will be considered hereinafter.

7. On the other hand, the learned Standing Counsel submitted that the principle of merger will apply. It was contended that the order of the High Court merged with the order of the Supreme Court, as a result, upon the setting aside the judgment of the High Court, the original demand revived. Since the amount was not paid as per the original demand within the stipulated period, interest became payable from 1963 onwards till the date it was actually paid and, therefore, the order of the Assistant Excise Commissioner imposing penal interest at the rate of

18% per annum did not suffer from any error of law.

8. In order to find out as to whether penal interest was payable on the excise demand, it would be essential to peruse Section 38A of the Act, which is the charging section for realisation of interest upon failure to pay the excise revenue within the stipulated period. For facility, the said provision is extracted hereunder:-

"38-A. Interest on arrears of excise revenue. - (1) Where any excise revenue has not been paid within three months from the date on which it becomes payable, interest at such rate not exceeding twenty-four per cent per annum, as may be prescribed, shall be payable from the date such excise revenue becomes payable till the date of actual payment:

Provided that until a higher rate is prescribed, the rate of interest will be eighteen per cent per annum;

Provided further that in respect of an excise revenue which became payable before the commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 interest at the said rate shall be payable from the date of such commencement if the excise revenue is not paid within 3 months of the said date."

9. The aforesaid provision was inserted by U.P. Act No. 7 of 1985 with effect from 28th March, 1985.

10. It is apparently clear from a perusal of the aforesaid provision that the said provision is prospective in nature and would apply to such excise revenue, which "becomes payable" from 28th March, 1985 onwards. The second proviso however, opens a limited window for charging interest on excise revenue which "became payable" prior to 28th March, 1985, namely, where any excise revenue, "became payable" before the commencement of U.P. Act No. 7 of 1985 and was not paid within three months from the date of enforcement of U.P. Act No. 7 of 1985.

11. In the light of this proviso, the department is justifying their action in contending that penal interest became payable since the excise department issued a demand between the period 1963 to 1973 and which was not paid by the petitioner within the stipulated period.

12. This leads to the question as to whether excise revenue as demanded by the Excise Commissioner by its various orders issued between the year 1963 to 1973 became payable or not. The words "becomes payable" as depicted in Section 38A of the Act is of significance importance. The question that comes up for consideration is, when does the amount "becomes payable".

13. According to the department, pursuant to the order of the Supreme Court, the order of the High Court was set aside as a result, the demand raised by the Excise Commissioner revived and since the demand as per the orders of the Excise Commissioner was not paid within the stipulated period interest became

payable as per the second proviso to Section 38A of the Act.

14. On the other hand, it was submitted by the learned Senior Counsel for the petitioner that the order of the Excise Commissioner was quashed, which was wiped out from the face of the earth. There was no demand on the basis of which any excise revenue became payable. After the order of the Supreme Court, the excise revenue became payable afresh and, within the stipulated period of 3 months, the amount was paid. It was urged that interest was only payable if the amount was not paid within three months. It was also contended that pursuant to the decision of the Supreme Court, the demand made by the Excise Commissioner between 1963 to 1973 did not revive automatically and that a fresh demand could only be issued, and upon failure to pay the amount within the stipulated period, penal interest could be imposed thereafter.

15. Having heard the learned counsel for the parties, we are of the opinion that the words "becomes payable" as stipulated under Section 38A of the Act means "legally recoverable". The excise revenue becomes payable when it is determined. Once the Supreme Court decided the issue and held the excise revenue was legally recoverable, the same was required to be paid by the petitioner. Failure to pay thereafter within the stipulated period would invite penal interest but not before. Our view is fortified by a decision of the Supreme Court in the case of *New Delhi Municipal Committee v. Kalu Ram and another*, 1976 (3) SCC 401, wherein the Supreme Court held as under:

".....Does Section 7 of the Public Premises (Eviction of Unauthorised Occupants) Act, 1958 create a right to realise arrears of rent without any limitation of time? Under section 7 the Estate Officer may order any person who is in arrears of rent "payable" in respect of any public premises to pay the same within such time and in such instalments as he may specify in the order. Before however the order is made, a notice must issue calling upon the defaulter to show cause why such order should not be made and, if he raised any objection, the Estate Officer must consider the same and the evidence produced in support of it. Thus the Estate Officer has to determine upon hearing the objection the amount of rent in arrears which is "payable." The word "payable" is somewhat indefinite in import and its meaning must be gathered from the context in which it occurs. "Payable" generally means that which should be paid. If the person in arrears raises a dispute as to the amount, the Estate Officer in determining the amount payable cannot ignore the existing laws. If the recovery of any amount is barred by the law of limitation, it is difficult to hold that the Estate Officer could still insist that the said amount was payable. When a duty is cast on an authority to determine the arrears of rent, the determination must be in accordance with law. Section 7 only provides a special procedure for the realisation of rent in arrears and does not constitute a source or foundation of a right to claim a debt otherwise time-barred. Construing the expression "any money due" in Section 186 of the Indian Companies Act, 1913 the Privy Council held in *Hans Raj Gupta and others v. Official Liquidators of the Dehradun Mussorie Electric Tramway Company Ltd.* (1)

that this meant moneys due and recoverable in suit by the company, and observed: "it is a section which creates a special procedure for obtaining payment of moneys; it is not a section which purports to create a foundation upon which to base a claim for payment. It creates no new rights." We are clear that the word "payable" in Section 7, in the context in which it occurs, means "legally recoverable." Admittedly a suit to recover the arrears instituted on the day the order under Section 7 was made would have been barred by limitation. The amount in question was therefore irrecoverable. This being the position, the appeal fails and is dismissed with costs."

16. In view of the aforesaid, the words "becomes payable" means legally recoverable. The excise demand became legally recoverable from the date of the decision of the Supreme Court. Prior to that the demand could not be legally recoverable as it was not payable since the demand had been quashed by the High Court.

17. In *Food Corporation of India v. State of Haryana and another*, 2000 (3) SCC 495, the facts were that the State of Haryana imposed sales tax on levy transaction in the year 1973, which was challenged before the Punjab and Haryana High Court. The writ petition was allowed and the High Court held that the State of Haryana did not have the constitutional authority to impose sales tax on levy transaction. In the year 1982, the State of Haryana again issued a demand notice, which was again challenged and the levy of tax was again quashed. This time the matter travelled to the Supreme Court. The Supreme Court allowed the appeal and held that the State of Haryana was competent to levy sales/purchase tax on such transactions. Pursuant to the decision of the Supreme Court, fresh demand notices were again issued for the assessment year 1975-76 onwards, which the assessee paid but subsequently, interest was imposed. The Supreme Court held that interest was not payable as there was no valid demand levying sales tax in existence. The Supreme Court held that the demand for payment of sales tax was quashed by the High Court and, therefore, no interest for this period could have been paid. The Supreme Court held:

"10. As we have noticed here in above, so far as the State of Haryana is concerned during the period between 17.5.1975 to 6.1.1997, the law declared by the High Court was that the State of Haryana did not have the constitutional authority to impose sales tax on levy transactions. This declaration of law was not challenged by the State; per contra the State of Haryana accepted the declaration of law made by the High Court, therefore, until the position of law stood changed from 6.1.1997, the State of Haryana could not have made a demand for the payment of sales tax on levy transactions. The demand notice by which the State claimed the tax for Assessment Year 1975-76 was of the year 1982 which fell within the period when the law did not permit the State of Haryana to impose sales tax on levy transactions. Therefore, on that day when the notice of demand was issued for payment of sales tax for Assessment Year 1975-76, the demand was without authority of law. Subsequently, the State of

Haryana could have made such demand only after the judgment of this Court which was delivered on 6.1.1997. There is no doubt that by the judgment of this Court, the right of the State of Haryana to collect sales tax would date back to 1975 but that is not the same as saying that during the said period when the law was adverse to the State of Haryana it could still have made a legitimate demand, because, as stated above, during the period between 1975-77, the State's authority to make a demand was eclipsed because of the law declared by the High Court. The declaration of law made by this Court now empowers the State to raise a demand even for Assessment Year 1975-76 and the appellant is bound to satisfy the said demand, but the duty of the assessee to satisfy that demand would arise only when a fresh and valid demand after the judgment of this Court is made by the State. If the assessee fails to pay after the fresh demand is made then as contemplated under Section 59 of the Haryana Act, the assessee becomes liable to pay the interest also.

13. The further question, therefore, is whether on the demand now made by the respondents on the appellant, the State can also claim interest. We have noticed that the power of the State to collect interest arises under Section 59 of the Act. The said section authorises the State to collect interest on belated payment of tax demanded but this payment of interest can be levied on such belated payment of tax which is legally payable for which a valid demand is condition precedent. As has been noticed by us, the demand notice of the year 1982 which was issued during the period when the State had no authority to levy sales tax cannot be said to be a valid demand, based on which interest could be claimed. A valid demand for Assessment Year 1975-76 could have been made by the State of Haryana only after the judgment of this Court i.e. from 6.1.1977 and on such a demand being made on 20.2.1977, the appellant has satisfied the said demand within the period available to it. If that be so, in our opinion, the State could not have demanded interest on the tax due for Assessment Year 1975-76 based on its earlier demand notice."

18. We are of the opinion that once the High Court had quashed a demand, the excise authorities did not have any authority to realise excise revenue on wastage of beer nor could the excise department make a valid demand for payment of excise revenue on wastage of beer during the period when the judgment of the High Court ruled the roost. So long as the decision of the High Court stood, there was no valid demand for payment of excise revenue on wastage of beer. Only after the judgment of the Supreme Court, which was delivered on 23rd September, 2011 that the excise department could raise a fresh demand. No doubt, the right of the excise department to collect the excise revenue would date back to the period 1963 to 1973 but that is not the same as saying that during the said period when the law was adverse to the excise department it could still have a legitimate demand. In our opinion, till the date of the decision of the Supreme Court i.e. till 23rd September, 2011, the demand of excise duty on wastage of beer was eclipsed because of the law declared by the High Court. In our opinion, the law declared by the Supreme Court empowered

the excise department to raise a demand afresh for the period 1963 to 1973. The petitioner was bound to satisfy the demand, which would arise only when a fresh and valid demand is made after the judgment passed by the Supreme Court.

19. The contention that the principle of merger would apply and that the demand raised by the excise department would automatically revive pursuant to the quashing of the judgment of the High Court is wholly erroneous. There is no quarrel with the decision cited by the department *Kunhayammed and others v. State of Kerala* and another, 2000 (6) SCC 359 on the doctrine of merger but the same has no application to the controversy involved. The judgment of the High Court merges with the judgment of the Supreme Court but the excise demand, which has been quashed cannot revive on its own. The excise demand has to be raised afresh by issuance of a fresh valid demand notice and if upon issuance of the fresh notice, the amount is not paid within the stipulated period in that event, penal interest would become payable. In the instant case, the payment was made within the stipulated period, as a result, no penal interest became payable by the petitioner.

20. The decision cited by the respondents in *Shiv Kumar and others v. Collector, Kanpur Nagar and others*, 2005 ALJ 417 and *Rampur Distillery and Chemical Co. Rampur v. State of U.P. and others*, 2005 (1) AWC 334 is distinguishable and is not applicable in the instant case. In the said decisions, the demand was stayed by the High Court during the pendency of the writ petition. Upon dismissal of the writ petition, the amount became payable along with interest. The interest factor was again challenged by the petitioner. The writ Court upheld the demand for payment of interest holding that staying the recovery of tax does not prevent the running of interest.

21. In this regard, the Supreme Court in *Sri Chamundi Mopeds Ltd. v. Church of South India Trust Association*, 1992 (3) SCC 1 has clearly distinguished and differentiated between a demand being stayed vis-a-vis a demand being quashed. The Supreme Court held:-

"While considering the effect of an interim order staying the operation of the order under challenge, a distinction has to be made between quashing of an order and stay of operation of an order. Quashing of an order results in the restoration of the position as it stood on the date of passing of the order which has been quashed. The stay of operation of an order does not, however, lead to such a result. It only means that the order which has been stayed would not be operative from the date of passing of the stay order and it does not mean that the said order has been wiped out from existence."

22. The Supreme Court held that the effect of an interim order staying the operation of the order under challenge only makes the said order inoperative from the date of the passing of the stay order and does not wipe out the said order from its existence. On the other hand, an order, which is quashed results in the restoration of the position as it stood on the date of the passing of the order,

which had been quashed.

23. It was urged by the learned Standing Counsel that at the time when the writ petition was entertained, the learned counsel for the petitioner conceded that interest was payable from the date when Section 38A of the Act was enforced i.e. from the year 1985. This concession was recorded by the Court in its interim order dated 8th June, 2012. The learned Standing Counsel urged that in view of the concession given by the learned counsel for the petitioner, it was no longer for them to contend that no penal interest was payable even after 1985.

24. The submission of the learned Standing Counsel appears to be attractive but the same is untenable. The reasons is not far to see. In our opinion, there can be no estoppel against a statute since the statute is very clear. The period of limitation has to be adhered in accordance with the provision of the Act. The concession given by the Counsel has no effect. We are of the opinion that concession given by a Counsel cannot override the mandatory statutory provision. This view of ours is supported by a decision of the Supreme Court in *Vijay Narayan Thatte and others v. State of Maharashtra and others*, 2009 (9) SCC 92.

25. In the light of the aforesaid decision, it is apparently clear that when the High Court quashed the demand notice, it was wiped out from the face of the earth. Once the demand order was quashed, it was no longer in existence and, therefore, there was no valid demand for payment of excise duty during the period when the order of the High Court prevailed. It is only when the Supreme Court reversed the decision of the High Court that the excise demand became payable upon a fresh notice of demand. Penal interest becomes payable when the fresh demand is not paid within the stipulated period. In the instant case, the excise demand was paid within the stipulated period and, therefore, the question of demand of penal interest does not arise.

26. In the light of the aforesaid, the impugned demand of penal interest dated 1st June, 2012 cannot be sustained and is quashed. The writ petition is allowed.