

(2006) 11 DEL CK 0024

In the Delhi High Court

Case No : Writ Petition (C) No. 17658 of 2005

Sh. Siddharth Nagpal

APPELLANT

Vs

Union of India (UOI) and Another

RESPONDENT

Date of Decision : 29-11-2006

Acts Referred:

Constitution of India, 1950 — Article 20
Income Tax Act, 1961 — Section 271

Citation : (2006) 11 DEL CK 0024

Hon'ble Judges : Anil Kumar, J

Bench : Single Bench

Advocate : Raman Kapoor, for the Appellant; Sanjay Katyal, for the Respondent

Final Decision : Allowed

Judgement

Anil Kumar, J.—The petitioner has sought quashing of the demand letter dated 21.6.2004 issued by the respondent No. 2, Deputy Land and Development Officer imposing excess penalty rates with retrospective effect and a direction to the respondent No. 2 to refund the excess amount charged from the petitioner as penalty.

2. Brief facts to appreciate the controversies are that properties bearing No. J-3(B) and J-3(C) were allotted to Shri Jairam Dass Nagpal, grandfather of the petitioner, by a perpetual lease deed dated 18.2.1971 executed by Shri Jairam Dass Nagpal and the Land and Development Officer, on behalf of the President of India, Lesser.

3. It is contended by the petitioner that after the demise of Shri Jairam Dass, rights in the property devolved upon him and the property was mutated in his name in 1983, under the guardianship of his father as the petitioner was a minor at that time. The petitioner further submitted that the plot bearing No. J-3(B) was constructed upon by Late Jairam Dass, however, no construction was carried out on plot number, J-3 (C). When the petitioner attained majority and was in a

position to carry out construction on the plot bearing number J-3 (C), he requested the Land DO for issuance of No Objection Certificate vide letter dated 9.3.2004 so that he could get the building plans sanctioned from the Municipal Corporation of Delhi.

4. Thereafter instead of issuing No Objection Certificate, a letter dated 21.6.2004 was issued by the respondent No. 2 wherein it was stated that "No objection certificate" would be issued only if the petitioner pays an amount of Rs. 10,15,895/- by way of penalty for non-construction on the property for a period from 1.1.1976 to 30.6.2005 and Rs. 102/- on account of ground rent from 1.4.1971 to 31.3.2005 for the property within 15 days. The petitioner asserted that no such demand or an intimation of any penalty being levied against him for non construction in the property was ever communicated to him until the letter for issuance of no objection certificate was sent by the petitioner.

5. The petitioner, however, under protest and without prejudice to his rights made the payment of the aforesaid amount by cheques bearing numbers 274222 and 274224, which was duly received by the respondents on 5.7. 2004 subsequent to which by letter dated 26.7.2004 "No Objection Certificate" was issued by the respondents. The petitioner, thereafter, made a representation dated 8.9.2004 to the respondents for the consideration of the case and withdrawal of demand of penalty amount but the respondents refused the same by reply dated 14.12.2004. Again a request was made by the petitioner by letter dated 5.4.2005 but to no avail. The petitioner has, Therefore, impugned the action of the respondents in demanding the amount towards penalty for non construction as applicable to the Delhi Development authority in terms of office order dated 15.7.1998 bearing No. 7/98. The plea of the petitioner is that for extension of time for construction, penalty demanded from him should be based on the rates applicable as per the office order of the respondents dated 31.3.1976 bearing number 24/76 till the new rates as applicable to the Delhi Development Authority were adopted by the respondents.

6. The petitioner has impugned the letter dated 21.6.2004 on the ground that the respondents did not raise any demand until the petitioner requested for issuance of NOC and that the new rates, as applicable to the Delhi Development Authority which were adopted by the respondents, cannot be imposed retrospectively and could only be charged on a prospective basis and Therefore the letter dated 21.6.2004 is illegal and liable to be set aside and quashed and the excess amount paid by the petitioner is liable to be refunded to the petitioner. It is submitted by the petitioner that his liability, if any, is only at the rates chargeable under 1976 notification until 1998 and for the period subsequent thereto the petitioner admitted his liability to pay the alleged penalty rates as applicable to the Delhi Development Authority as per the 1998 notification. It is Therefore contended by the petitioner that the action of the respondent in imposing the penalty rates as per 15.7.1998 office order retrospectively is, illegal, bad in law and is liable to be set aside and he is

entitled for refund of excess amount charged from him.

7. The petitioner relied on Sri Vijayalakshmi Rice Mills, New Contractors Co. and Others Vs. State of Andhra Pradesh, 1973 Tax.L.R. 1424 Rao Shiv Bahadur Singh and Another Vs. The State of Vindhya Pradesh, ; Mohari Lall and Another Vs. The Corporation of Calcutta, to contend that unless expressly provided a notification takes effect from the date on which it is issued and not from a prior date and an amending statute should be given effect prospectively and not retrospectively unless there is an express provision to that effect.

8. The petition is contested by the respondents who have filed the counter affidavit of A. Bhattacharya, Deputy Land and Development Officer, refuting the averments made in the petition. Respondents contended that the petitioner applied for issuance of "No Objection Certificate" in the year 2004 and since there was a violation of Clause I (ii) of the Lease Deed consequently a penalty was imposed on the petitioner for belated construction for a period from 1.7.1976 to 30.6.2005 and the ground rent from 1.4.1971 to 31.3.2005 was claimed and demanded as per the prevailing policy. Respondents asserted that since complete penalty has already been paid by the petitioner and 'No Objection Certificate' has already been issued, so the petitioner is legally estopped from claiming any remedy which was available to him prior to making of payment of the penalty amount. The respondents further contended that the penalty for belated construction was imposed with reference to the date of execution of the lease deed i.e. 18.2.1971 and the general relaxation of five years was allowed to the petitioner in terms of office order No. 7/98 and as the petitioner applied for No Objection Certificate on 9.3.2004, after the issuance of office order dated 15.7.1998 by which the rates applicable to the Delhi Development Authority were adopted and, Therefore, the said rates are applicable and Therefore penalty was demanded as per the order dated 15.7.1998. It is admitted by the respondents that the office order No. 7/98 dated 15.7.1998 is applicable from the date of the issue and there is no provision for giving retrospective effect.

9. The respondents have relied on Ghansham Dass Seth and Another Vs. Union of India (UOI), to contend that a no objection certificate can be issued after imposing penalty for belated construction and imposition of penalty for belated construction is justifiable, if the allotted plot remained vacant for a considerable period. The office order 7/98 dated 15th July, 1998 categorically stipulated that in respect of rehabilitation properties, action was contemplated for re-entry of plots as per the terms of lease, if there was delay in carrying out the construction and in case of lessee coming forward to compromise, the re-entry was to be withdrawn on terms which would have included the penalty.

10. The petitioner filed the rejoinder denying the averments made by the respondents in the counter affidavit and reiterating the submissions made in the petition, that on consideration of the case of the petitioner for extension of time for construction penalty demanded could be on the basis of rates applicable prior

to 15th July, 1998 and as per the office order dated 31.3.1976 bearing No. 24/76 till the new office order came into force as it was not retrospective and that the respondents could not demand much higher rate of penalty with retrospective effect by applying the office order dated 15.7.1998 bearing No. 7/98 as it was not applicable prior to 15th July, 1998 when it was issued by the respondents.

11. I have heard the Counsel for the parties and have perused the petition, counter affidavit, rejoinder and the documents filed with them. The learned Counsel for the petitioner has not denied the liability of the petitioner to pay the penalty for non construction on the plot but he has restricted his submission that on the basis of office order dated 15th July, 1998, the penalty can not be recovered from him prior to that date as till that date office order dated 31st March, 1976 bearing No. 24/1976 was applicable. The disagreement, Therefore, pertains to whether the office order dated 15.7.1998 bearing No. 7/98 could be applied retrospectively in the facts and circumstance of the case for determining the penalty claimed from the petitioner.

12. Before answering the question as to whether the respondents have imposed the penalty rightly consideration of the terms of the lease will be appropriate. The relevant Clause I (ii) of the Lease deed as under:

Within the period of 24 calendar months next after the date of these Presents lessee shall and will add it own expense , reject and finish fit for habitation on the site hereby demised one building*single storeyed containing one residential flat or*double storeyed consisting of one or two residential flats. in all , whether by Satire on top as may be approved by the Chief commissioner, Delhi was such Officer body as the lesser. the Chief commissioner, Delhi. May authorise in this behalf , together with all necessary outhouses, sewers, drain and other appurtenances in accordance with the planned or plans to be approved off in writing. five , the Chief commissioner, Delhi was such Officer body as the lesser for the Chief commissioner Delhi May authorise in this behalf. And all the drains and sewers for the said to myself , shall be constructed, laid and constructed to the satisfaction of the Chief commissioner and the appropriate Municipal Authority and in such position and shall be directed by the said Chief commissioner or as may be required by the said Municipal Authority.

Perusal of this Clause I (ii) of lease deed dated 18.2.1971 makes it apparent that the petitioner was expected to carry out the construction on the premises within a period of two years which was not done by the petitioner. Therefore, the plea of the petitioner that there was no time specified in the lease deed within which the property was to be constructed upon is unacceptable and which plea has also not been pressed by the learned Counsel for the petitioner, Mr. Kapoor.

13. Therefore, the plea which requires adjudication is whether the respondents have rightly levied and claimed the amount of penalty on the basis of office order dated 15th July, 1998 for the period prior to that date when the office order dated 31.3.1976 bearing No. 24/76 was applicable. The office notification

31.3.1976 dated bearing No. 24/76 for rates of penalty for belated construction is as under:

Office Order number 24/76

Subject: Belated construction -instructions regarding

The following rates of penalty for the belated construction will be leviable: up to 3 months 2 %of the premium.

up to 3 to 6 months 3% of the premium.

For 6 to 9 months 4% of the premium.

For 9 to 12 months 5% of the premium.

Note: The following periods will not be counted for recovery of penalties for belated construction:

Up to 31.12.1968 and 18.11.1971 to 17.11.1972 and 1.7.74 to 30.6.1976.

Where land development Officer is satisfied that the lessee took and tangible steps for construction but had been prevented from doing so, for good reasons, land and development Officer may grant extension of time on year to year for completion of the building without recovery of penalty.

Except prolonged and the acute illness of the lessee or anybody in the family, no other ground warrants extension of time without levy of penalty and where no tangible steps have been taken by the lessee to the satisfaction of land and development Officer extension with penalty should be the practice.

This supersedes all previous orders on the subject.

The notifications provides for instances where extension could be granted without imposing any penalty and under what circumstance penalty was to be imposed for non construction. The notification contemplated rates for belated construction up to 12 months at 5% of premium. The notification also contemplated that where the lessee took tangible steps for construction and was prevented from doing so for good reason, extension could be granted on year to year basis without recovery of penalty and where no tangible steps were taken extension was to be granted with penalty. There is no other office order produced by the respondents for levy of penalty for the period for non construction of more than 12 months. This is also not the case of the respondents that penalty for non construction for more than 12 months was imposed on higher rates or that non construction for more than 12 months was not regularized subject to levy of penalty. Therefore the inevitable inference in the facts and circumstances is that till 1998 the non construction of plot was regularized on the basis of imposing penalty on the rates as detailed in the office order dated 31st March, 1976 bearing No. 24/76.

14. Penalties on account of non construction of plots have been allotted on the

basis of office order dated 15th July, 1998 bearing No. 7/1998 which does not, however, stipulate that the rates contemplated therein shall be applicable for the period prior to the date of said notification. Relevant portion of the office order dated 15.7.1998 is as under:

Office order No. 7/98

Sub: Delay in construction on plots allotted by the land and development Officer- guidelines regarding.

Instructions issued vide the Ministry of UAE O.M. No. J-16011/1/93-LD dated 13 1993 for extension of time for construction on plots allotted by Land DO were circulated vide this office's office order number 10/93 dated 31.3.1993. The instructions have now been reviewed by the Ministry of UAE and it has been decided that, in respect of rehabilitation properties with the Land DO, action should be initiated immediately for re- entry of the plots in the in as per the terms of lease, if the delay on the product lessee in carrying out construction thereon. In response to this, if the lessee come for a compromise, the partnership to offer terms for withdrawal of re-entry, which may include, inter alia, penalties. The quantum of penalty should be at par with that being charged by the Delhi development authority in such cases?

2. In respect of the institutional plots, extension for constructions shall be granted on case to case basis up to five years by the land and development Officer , and thereafter the petition shall be granted only with the approval of the Ministry. However, the maximum period for which such extension shall be allowed is 10 years in all, and in case no construction takes place within this period, the allotment shall be cancelled and not would be put to alternative use.

15. Perusal of both the notifications make it clear that penalty is livable in cases of extension of time for construction before granting no objection Certificate by the Land DO and that under the notification dated 15.7.1998 bearing No. 7/98, a higher rate of penalty was chargeable for extension of time for construction compared to the 1976 notification.

16. Perusal of cases relied on by the petitioner it reveals that in Ghansham Dass Seth (supra) there was no dispute with regard to the rate on which penalty was imposed. The only question which came for consideration was whether levy of penalty for belated construction was justified, which was answered in affirmative as the petitioner in that case for 40 years did not carry out any construction on the plot despite the extension being granted to him earlier also. The ratio of said case is not applicable to the present facts and circumstances as in the present case there is no dispute as to whether penalty can be imposed for belated construction or not, Therefore, this case is not of much relevance in determining the issue raised in the petition as the question here pertains to the rate at which the penalty is to be calculated by the respondents and whether in calculating the quantum of penalty can the respondents apply an office order retrospectively.

17. The office order 7/1998 dated 15th July, 1998 is not retrospective. The power to make law includes the power to give it retrospective effect. Therefore retrospective laws can be made provided no fundamental right or right is infringed by reason of taking away a vested right by the retrospective legislation. It is a cardinal principle of construction that every statute is prima facie prospective, unless it is expressly or by necessary implication, made to have retrospective operation. Unless there are words in the statute sufficient to show the intention of the legislature to affect existing rights, it is deemed to be prospective only. In *Govind Das and Others Vs. The Income Tax Officer and Another*, it was laid down that:

Now it is well settled rule of interpretation hallowed by time and sanctified by judicial decisions that unless the terms of a statute expressly so provide or necessarily require it, retrospective operation should not be given to a statute so as to take away or impair an existing right or create a new obligation or impose a new liability otherwise than as regards matters of procedure. The general-rule as stated by HALSBURY in Vol. 36 of the LAWS OF ENGLAND (3rd Edn,) and reiterated in several decisions of this Court as well as English Courts is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or of evidence are prima facie prospective and retrospective operation should not be given to a statute so as to affect, alter or destroy an existing right or create a new liability or obligation unless that effect cannot be avoided without doing violence to the language of the enactment. If the enactment is expressed in language which is fairly capable of either interpretation, it ought to be construed as prospective only.

18. Retrospective operation should not be given to a statute so as to alter or create a new liability or obligation unless that affect can not be avoided without doing violence to the language of the enactment, a fortiori, by an office order also the respondents can not create a new liability or obligation. In fact the office order dated 15th July, 1998 does not create new liability or obligation and in its express language nothing is stipulated that the rates indicated therein will be applicable even for the period prior to the date of said notification. Applying this office order retrospectively can lead to anomalous results. The liability which was created under earlier office order dated 31.3.1976 bearing No. 24/76 can not be altered by a subsequent office order 7 of 1998. The office order 7 of 1998 is capable of only one interpretation and in the circumstances, it ought to be construed prospective only.

19. Respondents have imposed and claimed penalty as per the Government policy office order No. 7/98. The office order dated 15.7.1998 nowhere provides that the new rate of penalty which is at par with that of DDA would have retrospective application which fact has been admitted by the respondent in their counter affidavit also. It is a settled law that unless expressly provided a notification takes effect from the date on which it is issued and not from a prior date and cannot be applied retrospectively. In *Sri Vijayalakshmi Rice Mills, New*

Contractors Co. and Others Vs. State of Andhra Pradesh, the Apex Court held that:

It is well recognized rule of interpretation that in the absence of express words or appropriate language from which retrospectivity may be inferred, a notification takes effect from the date it is issued and not from the prior date. The principle is also well settled that statutes should not be construed so as to create new disabilities or obligations or impose new duties in respect of the transaction which were complete at the time the amending act came into force.

20. In Sri Vijayalakshmi Rice Mills (supra) sales were made by the appellants before the coming into force of the Rice (Andhra Pradesh) Price Control (Third Amendment) Order, 1964 and the property in the goods passed to the Government of Andhra Pradesh on the dates supplies were made, Therefore it was held that the appellants had to be paid only at the controlled price as on the dates the sales were effected and not the enhanced price which came into operation subsequently. It was held in that case that the appellants cannot claim the benefit of the increased price specified in the Rice (Andhra Pradesh) Price Control (Third Amendment) Order, 1964 which came into force after the sales were made.

21. In Commissioner of Income Tax, Bhopal (supra) Court held that quantum of penalty must be determined with reference to the law prevailing on the date when the act of concealment was committed and an order was passed. The Court observed that it is a settled rule of construction that an amending statute must be given effect to prospectively and not retrospectively unless there is expressed provision to that effect. The Court further observed that although imposition of penalty under the Income Tax Act is not a punishment for any offence so as to attract Article 20 of the Constitution, however, the principle under Article 20 would be applicable in the absence of any express provision to the contrary. In this matter concealment of Income tax took place prior to 1-4- 1968 when the original returns for the assessment years 1961-62 and 1962-63 were filed much before the amending act came into force. In these circumstances, it was held that the penalty will be livable in accordance with the provisions of Section 271 of the Act as it stood prior to amendment and not after the amendment, if the concealment had taken place after 1-4-1968 then the amended provisions would be attracted.

22. The petitioner has also relied Rao Shiv Bhadur Singh (supra) and Mohari Lall (supra) to contend that imposing of penalty retrospectively is violative of Article 20 of the Constitution of India which has little significance in the facts and circumstances of the case in hand as the Article 20 is applicable only to criminal proceedings and has no application to civil liability unless the statute makes such liability an offence.

23. In view of the law laid down by the Supreme Court in the aforesaid cases it is apparent that any notification or any amendment cannot be applied

retrospectively unless the language specifically provides for it and if the language of the office order is silent then it is implicit that it will be applied prospectively only so that it does not put anybody at a disadvantage. Therefore the intention is to be gathered from the language and if the language is silent then the notification is to be applied prospectively.

24. It is not in controversy that the amendment came to be issued by the Land DO on 15.7.1998 and the rate of penalty chargeable became much higher than those imposed under the 1976 notification. It is further admitted by the respondents also that the 1998 notification is applicable from the date of issue and that there is no provision for giving it retrospective effect. Therefore the notification dated 15.7.1998 is to be applied prospectively only and on the basis of said office order the penalty could not be imposed and claimed from 1976.

25. The petitioner applied for issuance of the No Objection Certificate for getting the building plans sanctioned by letter dated 9.3.2004 in respect of property which was allotted to the grandfather of the petitioner by lease deed dated 18.2.1971 at which relevant time the office order dated 31.3.1976 was applicable and the amendment to the office order came into force in 1998. Merely because the petitioner applied for issuance of NOC in 2004, he cannot be denied the benefit of 1976 notification and cannot be imposed penalty on the basis of office order of 1998 during the period, the said office order was not applicable. Therefore the respondents have erroneously imposed on the petitioner a uniform penalty by applying the office order dated 15.7.1998 retrospectively for the entire period from 1.1.1976 to 30.6.2005 and charged an excess amount of Rs. 9,47,125 which amount has not been challenged by the respondents.

26. The contention of the respondent that since the petitioner has made the payment of the penalty amount he is legally stopped from claiming any remedy which was available to him prior to making of payment of the penalty amount is also not acceptable in the facts and circumstances as the payment was made without prejudice to his rights and contentions as per the lease deed by the petitioner.

27. In the facts and circumstances the letter dated 21.6.2004 is quashed to the extent demanding penalty on the basis of office order dated 15th July, 1998 bearing No. 7/1998 for the period 1.1.1976 till the said office order came into force in 1998. The respondents are, Therefore, directed to claim penalty on the basis of office order dated 31st March, 1976 bearing No. 24/1976 for the period 1.1.1976 till office order No. 7/1998 came into force and Therefore, return the excess amount of penalty which has been recovered from the petitioner within four weeks. In case the amount of excess penalty, already received by the respondents, is not refunded to the petitioner within four weeks, besides the ramification of violation of this order the respondent shall also be liable to pay simple interest on the amount to be refunded to the petitioner @ 12% per annum.

28. With above stated direction the writ petition is, Therefore, allowed. However, considering the facts and circumstances the parties are left to bear their own cost.