

(2008) 12 AP CK 0010

In the Andhra Pradesh High Court

Case No : Writ Petition No. 11885 of 2005

Shri Ram Transport Finance Company Ltd.

APPELLANT

Vs

The Commissioner Prohibition and Excise, The Deputy
Commissioner Prohibition and Excise, The Govt. of A.P. and
The Karuru Vysys Bank

RESPONDENT

Date of Decision : 19-12-2008

Acts Referred:

Andhra Pradesh Excise Act, 1968 — Section 12, 13(2), 45, 46, 46(2)
Andhra Pradesh Prohibition Act, 1995 — Section 11B, 12, 13, 13(2), 13A
Civil Procedure Code, 1908 (CPC) — Section 144, 151, 2(14), 2(2), 9(3)
Constitution of India, 1950 — Article 226
Mines and Minerals (Development and Regulation) Act, 1957 — Section 9(3)
Partnership Act, 1932 — Section 69(2)

Citation : (2009) 3 ALD 90 : (2009) 2 ALT 710

Hon'ble Judges : V.V.S. Rao, J

Bench : Single Bench

Advocate : B. Vijaysen Reddy, for the Appellant; GP for Respondents 1 to 3, for the Respondent

Final Decision : Dismissed

Judgement

V.V.S. Rao, J.—An interesting question of importance arises in the writ petition. Whether the owner who obtained release of confiscable motor vehicle allegedly involved in the commission of an offence u/s 13(2) of Andhra Pradesh Prohibition Act, 1995 (Prohibition Act, for brevity) is obliged to honour the Bank Guarantee (BG), (furnished as per the orders of the Court) after lapse of some time when for obvious reasons value of vehicle seized and confiscated as per law depreciates to a lesser value than BG amount?

2. M/s. Sriram Transport Finance Company Limited having its registered office at Chennai in Tamil Nadu, advanced loan to one Ch. Sarada (hirer, for brevity) for purchase of TATA Goods Vehicle bearing No. AP 26 T 2039 under an agreement, dated 05.06.1996. During subsistency of such agreement, vehicle was seized on

28.07.1996 by the Excise Officials for involvement in a commission of offence under Prohibition Act. The lorry was found carrying 360 full bottles of Indian made liquor. Second respondent initiated proceedings for confiscation of lorry u/s 13(2) of the Prohibition Act. The hirer moved an application before second respondent for release of vehicle, which was rejected on 01.10.1996. The petitioner then moved writ petition before this Court being W.P. No. 7163 of 1998. This Court disposed of the matter directing second respondent to release the vehicle to petitioner on furnishing BG for value of lorry on condition that it shall not be alienated and shall be produced as and when required. The value was assessed by Road Transport Authority, Nellore, at Rs. 1,75,000/-. The petitioner furnished BG vide BG No. 5 of 1999, and vehicle was handed over to petitioner on 24.08.1999.

3. Second respondent issued show cause notice on 08.09.1999 for confiscation of the vehicle. The petitioner submitted explanation. The same was rejected and an order of confiscation was passed on 14.10.1999. The petitioner was also unsuccessful before first respondent in appeal u/s 13(c) of the Prohibition Act, which was dismissed on 06.03.2000. The petitioner through its Manager filed W.P. No. 10884 of 2000. By way of interlocutory orders in W.P.M.P. No. 17551 of 2000, dated 03.08.2000, the vehicle was directed to be released. The petitioner was again given possession of the vehicle on 22.12.2000 allegedly for the reason that the hirer did not pay the loan instalments as per the hire purchase agreement. Ultimately writ petition was dismissed on 16.04.2003. As vehicle was kept idle, the petitioner allegedly approached second respondent to surrender vehicle. He declined on the ground that the original RC Book was not available with petitioner. Petitioner obtained duplicate registration certification book from Motor Vehicle Authorities. The vehicle was produced before second respondent on 08.04.2005, which was taken into custody. After surrendering confiscable lorry, petitioner submitted application on 11.04.2005 to second respondent for release of BG. The same was not released by Excise officials on the ground that petitioner should pay Rs. 1,75,000/- because the vehicle produced by petitioner does not fetch such amount. The Excise officials intended to auction the vehicle and adjust shortfall if any from out of the BG amount. Therefore, petitioner filed instant writ petition seeking a writ of Mandamus directing respondents to release BG No. 5 of 1999.

4. Deputy Commissioner of Prohibition and Excise, Guntur filed counter affidavit opposing writ petition. The non-release of BG is justified contending that when petitioner's vehicle involved in excise offence is confiscated, the same cannot be released. The vehicle has to be auctioned and amount recovered has to be remitted to Government. As the vehicle was released in obedience to the Order of the High Court, on condition of petitioner furnishing BG for Rs. 1,75,000/-, they are bound to handover the vehicle at its assessed value of Rs. 1,75,000/-. By handing over the vehicle in depreciated value after lapse of six years there would not be compliance with the provisions of Section 13(2) of Prohibition Act. The vehicle returned by petitioner in deteriorated condition could fetch only Rs.

75,000/- in public auction and therefore, auction was postponed. When the vehicle released was valued at Rs. 1,75,000/-, the confiscation of the same value is justified.

5. Learned Counsel for petitioner and learned Government Pleader for Excise made their submissions. The former contending that when the vehicle released to petitioner was surrendered to Deputy Commissioner, he cannot keep bang guarantee. Learned Government Pleader contends that when vehicle was released to petitioner, its value was assessed at Rs. 1,25,000/- and petitioner is therefore bound to return money value of vehicle released and not a condemned vehicle. He invokes restitutionary jurisdiction of this Court placing reliance on relevant case-law to which a reference would be made at appropriate place.

6. Two questions would arise for consideration: (1) What is purport of "confiscation" of goods/vehicles involved in commission of excise/prohibition offence and what is "confiscated"? Is it vehicle itself or money value of vehicle when vehicle is involved in commission of excise/prohibition offence? This forms first aspect of the question. The second question is whether in exercise of restitutionary jurisdiction of this Court, Department of Excise can be permitted to encash BG for Rs. 1,25,000/- or recover shortfall after auctioning the vehicle?

7. Restitutionary jurisdiction is inherent in every Court, be it a Court exercising jurisdiction in private law or public law. Section 144 of Code of Civil Procedure, 1908 (CPC), is not inconsistent with power exercised under Article 226 of Constitution of India and High Court of Andhra Pradesh Writ Proceeding Rules, 1977. But Section 144 is not exhaustive though it manifests the maxim "*actus curiae neminem gravabit*". Simply put Section 144 of CPC enables the Court to order restitution when the appeal/revision Court varies or reverses the original Court's decision. It applies only to one such situation and not to situations where a party derives benefit under an order of the Court in exercise of its incidental or supplemental powers to grant stay/suspension/injunction and ultimately is unsuccessful after regular trial/hearing.

8. There is abundant authority that there can be number of situations where the Court can exercise its inherent power u/s 151 of CPC to prevent miscarriage of justice by reason of its orders. Such power is to be exercised by civil Court in discharge of its duty, which is explained by the well known maxim "*actus curiae neminem gravabit*". The power is exercised by civil Court to order restitution to ensure that no person - whether such person is party to the suit/application or not; gets undue advantage by its orders, and that no party is grossly prejudiced by its proceedings/orders.

9. In *Arunachalam v. Pratapasimha Rajah* AIR 1930 Madras 988, a Division Bench of Madras High Court considered this aspect of the matter and held as under.

As to the technical argument that the order is erroneous because it purports to have been passed u/s 144 and that that section will not apply because no decree

has been varied or reversed, we are not satisfied that the principle of Section 144 is confined exclusively to matters in execution. The Privy Council has in *Jai Barham v. Kedarnath Marwari* AIR 1922 PC 269 : 69 IC 278 : 49 IA 351 : 2 Pat. 10 laid down that the power of restitution is inherent in the Court and should be exercised when necessary in order to do justice. This Court has so exercised that principle in a suit at a stage between preliminary decree and the final decree in a case, *Cunnaiah Mudaly v. Rangaswami Mudaly* (1918) 48 IC 7.

In *Cheni chenchaiyah Vs. Shaik Ali Saheb and others*, , the facts are as follows. The petitioner therein filed suit on the file of the Court of the District Munsif for permanent injunction. He also filed an interlocutory application for temporary injunction, which was dismissed. The plaintiff filed interlocutory application along with miscellaneous appeal and the appellate Court granted an order of injunction. Meanwhile defendants forcibly threw out belongings of the plaintiff and evicted him from suit premises. Defendants then filed Civil Revision Petition before this Court. The same was disposed of by this Court ordering status quo with a direction to the Sub Court to dispose of the C.M.A., itself. Lower Court allowed appeal. Therefore, the plaintiff filed an application u/s 144 read with 151 of CPC for restitution, which was dismissed by Lower Court. Aggrieved by which plaintiff filed C.R.P. A contention was raised before this Court that as plaintiff was not dispossessed by virtue of any order of Court, restitution cannot be claimed u/s 144 of CPC and that plaintiff should have recast a suit and not application u/s 144 of CPC. This Court rejected these contentions and ordered restitution to plaintiff as he was unauthorisedly evicted by defendants during pendency of the proceedings. It was observed as under.

... on a consideration of the decisions referred to above, it can be seen that in the absence of specific provision in the Code which deals with particular situation or unless there is any prohibition either express or implied, the Court is entitled to exercise its inherent powers u/s 151 of Code of Civil Procedure. In this case, as I stated above, Section 144 of CPC is not applicable to the facts of the case because possession was not taken by any order of the Court. There is no other provision, which applies to the facts of the case i.e., where the possession has been taken forcibly by a party during the pendency of the proceedings i.e. when the application is dismissed by the trial Court and before filing the appeal. In these circumstances, I agree with the contention of the learned Counsel for the petitioner that in such circumstances, the Court would be justified to do justice and put back the parties in the same position in which they were, but for the order of the trial Court by invoking the inherent jurisdiction. Therefore, I agree with the contention that the Court in exercise of its jurisdiction u/s 151 can grant restitution, even though Section 144 CPC may not strictly apply. That view of mine, as I have stated above, is supported by the two Division Bench decisions stated supra in *State Govt. of Andhra Pradesh Vs. Manickchand Jeevraj and Co.*, Bombay, , and *P. Lingeswararao v. Venkata subbarao* 1966(2) A.WR 144.

(emphasis supplied)

In *Mrs. Kavita Trehan and another Vs. Balsara Hygiene Products Ltd.*, , Supreme Court considered restitutionary jurisdiction of the Courts. The appellant firm was clearing and forwarding agents of respondent. The principal terminated the agreement due to non-payment of large sums of commission amount. The appellant filed suit for declaration of the appellants' lien to an extent of about Rs. 16,00,000/- and obtained ex parte injunction directing the respondent not to interfere in the disposal of available stock. The appellant then sold away of stocks under the authority of Court's interim order and recovered a sum of Rs. 23,00,000/- when the goods were worth about Rs. 32,00,000/-. The suit was later transferred to Delhi High Court by order of the Supreme Court. The learned single Judge of Delhi High Court dismissed the suit as hit by Section 69(2) of Indian Partnership Act, 1932. The learned single Judge also considered the question of restitution of goods to the respondent or their money value. On that question, the learned single Judge directed plaintiff to furnish security by way of an F.D.R., from a Nationalised Bank in the name of the Registrar of the Court. This was confirmed by Division Bench. Before the Supreme Court, it was urged that Section 144 of CPC did not apply as no transfer of possession of any property pursuant to any order of the Court had taken place. It was also contended that Section 151 of CPC cannot be invoked, as it cannot in itself be seen as a source of jurisdiction. The Supreme Court while observing that Section 144 of CPC incorporates only a part of the general law of restitution and not exhaustive, laid down as under.

The jurisdiction to make restitution is inherent in every court and will be exercised whenever the justice of the case demands... In the case before us the injunction granted by the learned Senior Sub-Judge, Chandigarh, was not merely negative in terms interdicting interference from the respondent with the custody of the goods by the appellants; it went much further and expressly enabled the appellants to sell the goods, Pursuant to this order, the appellants disturbed the status quo as on the date of the suit and sold away respondent's goods and converted them into money. The High Court while declining the prayer for payment of the sale proceeds to the respondent, however, sought to relegate the parties to the extent practicable, to the same position as obtained on the date of the suit. This the High Court did by directing furnishment of security to the extent of the value of the goods sold away under the cover of the interlocutory order. That an appeal filed against the said interlocutory order was withdrawn, does not, in our opinion make any difference. Upon dismissal of the suit, the interlocutory order stood set aside and that whatever was done to upset the status quo, was required to be undone to the extent possible.

(emphasis supplied)

In *S. Prabhavathi Vs. Rohini Kilaru and Another*, , this Court laid down as below.

A plain reading of Section 144 of CPC would show that the provision as it stood prior to CPC Amendment Act 66 of 1956, did not apply to the proceedings at interlocutory stage. When a decree is varied or reversed in appeal or revision,

the Court, which passed the decree, can order restitution whenever an application is made by the party, who is entitled to any benefit by way of a restitution. By reason of the amendment, Section 144 of CPC was made applicable to a decree as well as an order. Section 2(2) of CPC defines "Decree" means the formal expression of an adjudication, which conclusively determines the right of the parties with regard to the matters in controversy in the suit. As per Section 2(14) of CPC, "Order" means the formal expression of any decision of the civil Court, which is not a decree. Therefore, an order necessarily refers to the formal expression of a decision by the court in incidental, supplemental and other interlocutory proceedings. Therefore, in the opinion of this Court, Section 144 of CPC is also applicable at interlocutory stage and restitution need not wait till the matters in the suit are conclusively determined by the Court.

In *South Eastern Coalfields Ltd. Vs. State of M.P. and Others*, , appellant and other company held mining lease for coal under Mines and Minerals (Regulation and Development) Act, 1957 (MMRD Act). Section 9(3) thereof, empowers Central Government to enhance or reduce rate of royalty. In exercise thereof, Union of India enhanced royalty from Rs. 60.50 per ton to Rs. 120/- per ton. When State Government initiated steps for recovering enhanced royalty, coal companies also enhanced rate of coal supplied to consumers. A batch of writ petitions was filed by consumers in High Court of Madhya Pradesh. Coal companies did not challenge enhancement but were impleaded as respondents in petitions filed by consumers. In all the writ petitions, High Court passed interlocutory orders directing respondents not to charge royalty on coal from the petitioners at enhanced rates but charge only old rate until further orders. As ordered by High Court, consumers had furnished BGs for payment of differential amount of royalty in the event of their liability being upheld by High Court. Subsequently High Court quashed notification enhancing rate of royalty though vires of Section 9(3) was upheld. Appeals filed by State of Madhya Pradesh as well as coal companies were allowed by Supreme Court vide *State of M.P. Vs. Mahalaxmi Fabric Mills Limited and others*, . The coal companies then issued notices demanding payment of differential amount of royalty enhanced and BGs were realized. At that stage, Director of Mines and Geology issued notices to coal companies demanding interest at 24% per annum for the period for which royalty payment was delayed. In turn coal companies raised demand on their consumers. Again a batch of writ petitions was filed. These were partly allowed directing interest at 12% per annum shall be paid within one month observing that interest at 24% per annum is paid if there was default. Aggrieved by the same, State of Madhya Pradesh as well as consumers preferred appeals before Supreme Court. A question was raised as to whether consumers/purchasers are liable to pay interest* to coal companies. It was contended that non-payment of enhanced amount of royalty was protected by interim judicial orders and therefore they are not liable to pay interest so long as money was withheld under protective umbrella of Court order. Supreme Court rejected submission and observed as under.

In our opinion, the principle of restitution takes care of this submission. The word "restitution" in its etymological sense means restoring to a party on the modification, variation or reversal of a decree or order, what has been lost to him in execution of decree or order of the Court or in direct consequence of a decree or order (See Zafar Khan and Others Vs. Board of Revenue, U.P. and Others,). In law, the term "restitution" is used in three senses: (i) return or restoration of some specific thing to its rightful owner or status; (ii) compensation for benefits derived from a wrong done to another; (iii) compensation or reparation for the loss caused to another. (See Black's Law Dictionary, Seventh Edition, P. 1315)...The interim order passed by the Court merges into a final decision. The validity of an interim order, passed in favour of a party, stands reversed in the event of final decision going against the party successful at the interim stage. Unless otherwise ordered by the Court, the successful party at the end would be justified with all expediency in demanding compensation and being placed in the same situation in which it would have been if the interim order would not have been passed against it. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost; and it is the duty of the court to do so unless it feels that in the facts and on the circumstances of the case, the restitution would far from meeting the ends of justice, would rather defeat the same. Undoing the effect of an interim order by resorting to principles of restitution is an obligation of the party, who has gained by the interim order of the Court, so as to wipe out the effect of the interim order passed which, in view of the reasoning adopted by the Court at the stage of final decision, the Court earlier would not or ought not to have passed. There is nothing wrong in an effort being made to restore the parties to the same position in which they would have been if the interim order would not have existed.

In Karnataka Rare Earth and Another Vs. The Senior Geologist, Department of Mines and Geology and Another, , Supreme Court followed South Eastern Coal Fields (supra) and reiterated scope of restitutionary jurisdiction as follows.

When on account of an act of the party, persuading the Court to pass an order which at the end is held as not sustainable, has resulted in one party gaining advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party, then the successful party finally held entitled to a relief; assessable in terms of money at the end of the litigation, is entitled to be compensated in the same manner in which the parties would have been if the interim order of the Court would not have been passed. The successful party can demand (a) the delivery of benefit earned by the opposite party under the interim order of the Court, or (b) to make restitution for what it has lost.

(emphasis supplied)

Restitutionary law has many branches. When restitutionary claims are to be found in equity as well as in law in many situations in many areas, an attempt to

trace power of restitution only to Section 144 of CPC is to ignore inherent power of the Court to do complete justice between parties. This power can be exercised even in interlocutory matters. When the party to the proceedings in the guise of an ex parte order gets an undue advantage to which he was not entitled to when the case was not decided, it is the duty of the Court to place parties in the position which they would have occupied but for the order of the Court. Therefore it shall become the duty of the Court to exercise restitutionary jurisdiction to (i) restore status quo ante or the date of initiation of proceedings in the Court; (ii) prevent any party to the suit to have undue advantage of Court proceedings even causes are dismissed; (iii) undo whatever is done by interlocutory intervention of Court in favour or against party. This is in addition to explicit power contained in Section 144 CPC to restore position when the decision of original Court is reversed by appellate/revisional Court. Though power of restitution is inherent in civil Court as held by Supreme Court, restitution in obedience to the decision of appellate/revisional Court is altogether different from restitution ordered by original Court when cause is dismissed against a person, who at interlocutory stage obtains some advantage.

The term "confiscation" is not defined in A.P. Excise Act, 1968/Prohibition Act. The verb "confiscate" is derived from Latin "con" with, and "fiscus", the basket or hamper, in which the Emperor's treasure was formerly kept. The meaning of the word "confiscate" is to transfer property from private to public use, or to forfeit property to the State. ("Words and Phrases, Permanent Edition, Volume 8A, "p.127.") Black's Law Dictionary (6th Edition, 1990) defines, "confiscable" as a thing capable of being confiscated or liable to forfeiture. "Confiscate" and "confiscation" are defined as follows.

Confiscate To appropriate property to the use of the government. To adjudge property to be forfeited to the public; to seize and condemn private forfeited property to public use. To take property from enemy in time of war.

Confiscation Act of confiscating. The seizure of private property by the government without compensation to the owner, often as a consequence of conviction for crime, or because possession or use of the property was contrary to law. The provisions of due process prohibit the confiscation of property without compensation except where the property is taken in the valid execution of the police power.

10. From the above definitions, it is clear that when a thing is made confiscable or power is conferred to confiscate goods/ things involved in an offence, it only means confiscating money value of such goods. The money value of the goods is realized by competent authority by selling goods/things/vehicles confiscated in accordance with the power conferred on such authority. That Excise Act and Prohibition Act confer power on authorized officer to confiscate money value of excise contraband or vehicle involved in excise offence, it becomes clear by some of provisions in these two enactments.

11. Chapter VII of Excise Act, which contains Sections 34 to 50-A deals with offences and penalties. For various excise offences enumerated in Section 34, the penalty can be (i) imprisonment as stipulated; (ii) fine as stipulated; and (iii) cancellation/suspension of licence and/or confiscation of goods/things, which are made confiscable. Section 45 enumerates things liable for confiscation. These are: (i) intoxicants, materials, utensils, implements etc., by means of which offence is committed; (ii) intoxicant liquors kept along with such liquors liable for confiscation; and (iii) animal, vehicle, vessel, raft or other conveyance used for carrying the intoxicant liquor etc. Sections 46, 46-A to 46-F deal with procedure, method and manner of confiscation. Section 46(2) confers power on the Deputy Commissioner of Prohibition and Excise to order confiscation of such property seized and detained under the provisions of the Excise Act [Sections 52 and 53 of Excise Act confer powers on Excise Officials to enter any premises for the purpose of inspection and power to seize articles liable for confiscation.]. Section 46-F is to the effect that, "when an order for confiscation ... has been passed ... property or portion thereof shall vest in the Government free from all encumbrances".

12. The conspectus of the provisions to which a brief reference is made above would show that Section 45 of the Excise Act enumerates kinds of property, which are confiscable, and Section 46(2) empowers confiscation of such property seized. When a confiscation order is passed, as per Section 46-F, "the property shall vest in the Government". This means what is liable for confiscation is not the goods or things or vessels or vehicles, but "money value of such property". Even jurisprudentially a thing which has value is property and if anything, which has no value, is not property at all. Similarly, when a vehicle involved in excise offence is seized and confiscated to the Government, what exactly the Legislature intended is confiscation of the goods or things or vehicles for the purpose of recovery of value of the confiscable property. This is made clear by Section 47(1) of Excise Act, which provides for compounding of offences. It reads as under.

47. Compounding of offences:- (1) The Collector, or any Prohibition and Excise Officer specially empowered in that behalf may accept from any person whose licence or permit is liable to be cancelled or suspended under Clause (a) or Clause (b) of Sub-section (1) of Section 31 or who is reasonably suspected of having committed an offence falling under Clause (b), Clause (c) or Clause (g) of Section 34 Clause (a), Clause (e), Clause (f), Clause (g) or Clause (h) of Section 36, Clause (b) Clause (c) or Clause (d) of Section 37 or Section 41 a sum of money not exceeding one lakh rupees and subject to such minima as may be prescribed, in lieu of such cancellation or suspension or by way of compensation for the offence which may have been committed as the case may be; and in all cases in which any property has been seized is liable to confiscation under this Act, may release the same on payment of the value thereof as estimated by such officer:

Provided that where the property so seized is a liquor manufactured in contravention of this Act, such liquor shall not be released but shall be disposed of in such manner as may be prescribed.

(emphasis supplied)

13. In case of compounding of an excise offence, the confiscable vehicle seized can be released only when the owner comes forward to pay the value of the vehicle estimated by the excise officer. This clearly shows that when a vehicle is seized for the purpose of confiscation, its value as on the date of seizure or as estimated by an excise officer in case of compounding is the value of the vehicle to be confiscated and not the value of the vehicle, which is surrendered by an offender subsequently.

14. There are in pari materia provisions in Prohibition Act as well. Chapter III contains offences and penalties. Section 12 of Prohibition Act provides that in any case in which a prohibition offence is committed, the liquor by means of which the offence has been committed along with receptacles, vessels etc., is liable for confiscation. This is without prejudice to powers of excise officers u/s 46 of the Excise Act. Sections 13, 13-A to 13-F of Prohibition Act contain procedure, method and manner of dealing with confiscation cases. u/s 13-F, property confiscated shall vest in the Government free from encumbrances and Section 11-B of Prohibition Act, which is in pari materia with Section 47 of Excise Act, provides for compounding of prohibition offences. It also contains a clause that when an offence is compounded, the property seized can be released on payment of value thereof as estimated by the officer. Thus, the Act provides for confiscation of money value of the property, be it the liquor or the vehicle by the use of which liquor was transported.

15. A reading of Section 45 read with Section 46(2) of the Excise Act and Section 12 read with Section 13(2) of the Prohibition Act would show that the Act empowers the Deputy Commissioner of Prohibition and Excise to order confiscation of the money value of the vehicle if such vehicle is involved in the commission of excise offence. This power as clarified in Section 46-D of Excise Act (Section 13-D of Prohibition Act) is in addition to initiation of criminal proceedings against accused and the result of criminal proceedings as acquittal or conviction will have no bearing on the order of confiscation passed under the Excise Act or Prohibition Act when the vehicle is seized. If it is subsequently released by reason of an order passed by Deputy Commissioner during pendency of confiscation proceedings or by a competent Court where confiscation order is challenged, the person who got released of the vehicle is bound to restore the vehicle with the same money value as estimated by an officer of the Excise Department when the vehicle was released in obedience to the order of the Court or the competent excise official. The laws confer such a right on the Excise Department. A reference may again be made to South Eastern Coalfields Ltd. (supra), wherein it is laid down as under.

The factor attracting applicability of restitution is not the act of the Court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. The quantum of restitution, depending on the facts and circumstances of a given case, may take into consideration not only what the party excluded would have made but also what the party under obligation has or might reasonably have made. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the Court not intervened by its interim order when at the end of the proceedings the Court pronounces its judicial verdict which does not match with and countenance its own interim verdict. Whenever called upon to adjudicate, the Court would act in conjunction with what is the real and substantial justice. The injury, if any, caused by the act of the court shall be undone and the gain which the party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the Courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced.

(emphasis supplied)

The vehicle involved in excise offence, which was financed by petitioner, was seized on 28.11.1996. When the vehicle was produced before the Deputy Commissioner in connection with an excise crime, petitioner filed an application for release of the vehicle, in vain. Thereafter, W.P. No. 7163 of 1998 was filed, which was disposed of ordering release of the vehicle on furnishing BG for the value as estimated by RTO. The value was estimated at Rs. 1,75,000/-, for which petitioner furnished BG and got release of the vehicle. Thereafter, an order of confiscation was passed on 14.10.1999. The petitioner through its Manager challenged the same in W.P. No. 10884 of 2000. They were successful in persuading this Court again to direct release of the vehicle, pending disposal of the writ petition. Ultimately, the writ petition was dismissed on 16.04.2003. Two years after dismissal of the writ petition being W.P. No. 10884 of 2000, on 08.04.2005, petitioner surrendered the vehicle. By that time, petitioner presumably used the vehicle at least from 1998 till 2003. On surrendering the vehicle ground, petitioner sought release of BG contending that as vehicle liable for confiscation is produced, Excise Department is not entitled to keep the BG.

Such a plea would not only be preposterous but also contravene the provisions of Sections 46(2) read with 46-F of the Excise Act and Section 13(2) read with 13-F of the Prohibition Act. When the order of confiscation was passed, such order was to confiscate the money value of the vehicle as estimated when the vehicle was seized. As directed by this Court, money value of the vehicle was estimated at Rs. 1,75,000/-, and therefore, the petitioner's vehicle is liable for confiscation for said amount. As the vehicle has already been surrendered, it has to be auctioned by Excise Department. Any short fall by Rs. 1,75,000/-, has to be adjusted and recovered from out of the BG amount. The petitioner is not entitled to seek a Mandamus for release of BG. The writ petition is misconceived and devoid of any merit.

16. In the result, for the above reasons, the writ petition fails and is accordingly dismissed with costs.