

***IN THE HIGH COURT OF DELHI AT NEW DELHI**

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Date of decision: 13th January, 2012

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LPA No. 27/2012

VIRENDER SHARMA

..... Appellant

Through: Mr. Aditya Kumar, Mr. Rupesh
Kumar, Advocates

Versus

DIRECTOR, ENFORCEMENT DIRECTORATE

..... Respondent

Through: Mr. C.S. Chauhan and Ms. Rajdeepa
Behura, Advocates.

CORAM :-

HON'BLE THE ACTING CHIEF JUSTICE

HON'BLE MR. JUSTICE RAJIV SAHAI ENDLAW

JUDGEMENT

A.K. SIKRI, ACTING CHIEF JUSTICE

1. The appellant is aggrieved from the dismissal vide order dated 12th December, 2011 of W.P.(C) No. 8108/2010 filed by him. The said writ petition was filed seeking mandamus for payment of ₹4,42,500/- stated to have been earned by the respondent by way of interest on the amount of ₹4,50,000/- belonging to the appellant and seized by the respondent; further relief of payment of interest at the rate of 10% per annum on the said ₹4,42,500/- was also claimed from 1st December, 2009.

2. The factual scenario in which the aforesaid reliefs were claimed in the writ petition was that, the cash of ₹4,50,000/- was seized by the respondent during a search on 26th April, 2000 at the premises of the appellant; according to the appellant, notwithstanding his filing reply to the memorandum issued to him, adjudication was not done compelling him to file W.P.(C) No. 72/2004 which was disposed of vide order dated 9th January, 2004 directing the Adjudicating Authority of the respondent to conclude the proceedings on or before 30th June, 2004; that the Adjudicating Authority vide order dated 30th June, 2004 held the appellant to be in contravention of Sections 8(1) and 8(2) of the Foreign Exchange Regulation Act, 1973 and imposed penalty of ₹2 lacs and ordered confiscation of ₹4,50,000/- already seized; that the appellant appealed thereagainst; that the Appellate Tribunal for Foreign Exchange vide order dated 15th October, 2007 allowed the appeal and set aside the order of penalty and confiscation as aforesaid; that the said order was accepted by the respondent but the seized amount of ₹4,50,000/- not returned compelling the appellant to write letters dated 22nd September, 2008, 3rd November, 2008, 24th July, 2009, 27th August, 2009, 2nd September, 2009, 14th October, 2009 and 11th December, 2009 for refund thereof; that the said amount of ₹4,50,000/- was finally

refunded vide cheque dated 1st December, 2009 under cover of letter dated 30th December, 2009. The appellant thereafter sought interest on the said amount of ₹4,50,000/- in terms of Rule 8 of the Foreign Exchange Management (Encashment of Draft, Cheque, Instrument and Payment of Interest) Rules, 2000 but no interest was paid. The petitioner further claims to have in response to a query under the Right to Information Act learnt that the amount of ₹4,50,000/- upon seizure was deposited in a fixed deposit and till the date of refund to the appellant on 1st December, 2009 had earned interest of ₹ 4,42,500/-. The respondent however vide their letter dated 25th June, 2010 declined the request of the appellant for interest on the ground that there was no provision therefor under Foreign Exchange Regulation Act, 1973. Ultimately, the writ petition aforesaid was filed.

3. The learned Single Judge dismissed the writ petition relying on the judgment dated 20th September, 2010 of the Division Bench of this Court in W.P.(C) No. 2812/2007 titled *Neeraj Kumar v. Commissioner of Central Excise*, on *Suganmal Vs. State of Madhya Pradesh* AIR 1965 SC 1740 and on *Union of India Vs. M/s Orient Enterprises* (1998) 3 SCC 501 on the ground that a writ petition claiming the relief only of payment of interest was not maintainable. The order dated 1st June, 2010 in W.P.(C) No.

10391/2009 titled *Amar Jeet Singh Vs. Directorate, Enforcement Directorate* relied upon by the appellant was distinguished as not dealing with the judgments (supra).

4. The counsel for the respondents appears on advance notice and considering the nature of the controversy, we have with consent heard the counsels finally on the appeal.

5. We may record that the stand of the respondents in the counter affidavit before the learned Single Judge in opposition to the writ petition also was that the appellant is not entitled to any interest since there was no provision therefor under the Foreign Exchange Regulation Act. The appellant in appeal has contended that the respondents having admittedly earned interest of ₹4,42,500/- cannot be allowed to unjustly enrich themselves; the principle of restitution is also invoked relying on *South Eastern Coalfields Ltd. Vs. State of Madhya Pradesh* (2003) 8 SCC 648 and *Karnataka Rare Earth Vs. Senior Geologist, Deptt. of Mines & Geology* (2004) 2 SCC 783. Reliance is also placed on Rule 8 (supra) which is as under:

“8. **Payment of interest on the seized Indian currency** – (i) Where it is found after completion of the investigation that the Indian currency seized under Section 37 of the Act is not involved in the contravention and is to be returned, the same shall be returned to such persons together with interest at the rate of 6% per annum from the date of seizure till the date of payment.

(ii) Where it has been found during the course of adjudication that the seized Indian currency is not relevant for such adjudication, the Adjudicating Authority may pass such order returning such Indian currency together with interest at the rate of 6% per annum to such person.”

6. The learned Single Judge having dismissed the writ petition solely on the ground of non maintainability thereof, it is apposite to deal with the said aspect first. The Apex Court recently in *Godavari Sugar Mills Ltd. Vs. State of Maharashtra* (2011) 2 SCC 439 after a consideration of the entire case law including *Suganmal* (supra), *U.P. Pollution Control Board Vs. Kanoria Industrial Ltd.* (2001) 2 SCC 549 and *ABL International Ltd. Vs. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553, made the legal position clear as under:-

- (i) Normally, a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability arising out of a breach of contract or a tort to pay an amount of money due to the claimants. The aggrieved party will have to agitate the question in a civil suit. But an order for payment of money may be made in a writ proceeding, in enforcement of statutory functions of the State or its officers;
- (ii) If a right has been infringed - whether a fundamental right or a statutory right and the aggrieved party comes to the Court for enforcement of the right, it will not be giving complete relief if the Court merely declares the existence of such right or the fact that existing right has been infringed. The High Court, while enforcing fundamental or statutory rights, has the power to give consequential relief by ordering payment of money realized by the Government without the authority of law;
- (iii) A petition for issue of writ of mandamus will not normally be entertained for the purpose of merely ordering a refund of money, to the return of which the petitioner claims a right. The aggrieved party seeking refund has to approach the Civil Court for claiming the amount, though the High Courts have the power to pass appropriate orders in the exercise of powers conferred under Article 226 for

payment of money;

- (iv) There is a distinction between cases where a claimant approaches the High Court seeking the relief of obtaining only refund and those where refund is sought as a consequential relief after striking down the order of assessment etc. While a petition praying for mere issue of writ of mandamus to the State to refund the money alleged to have been illegally collected is not ordinarily maintainable, if the allegation is that the assessment was without a jurisdiction and the tax collected was without authority of law and therefore the respondents had no authority to retain the money collected without any authority of law, the High Court has the power to direct refund in a writ petition.
- (v) It is one thing to say that the High Court has no power under Article 226 to issue a writ of mandamus for making refund of the money illegally collected. It is yet another thing to say that such power can be exercised sparingly depending on facts and circumstances of each case. For instance, where the facts are not in dispute, where the collection of money was without authority of law, there is no good reason to deny a relief of refund to the citizens.
- (vi) Where the *lis* has a public law character or involves a question arising out of public law functions on the part of the State or

its authorities, access to justice by way of a public law remedy will not be denied.

7. In our view, the facts of the present case require this Court to exercise the discretion vested under Article 226 of the Constitution of India to step out of the “normal” rule and grant the relief. The said power has been recognized / upheld in the judgment (supra) also and we find the present to be a fit case for exercise thereof. As aforesaid, the facts are not in dispute.

8. The reasons for which we chose to exercise the said power, which the Apex Court in the judgment (supra) has held is to be exercised sparingly, are:

(i) The seizure of the principal amount of ₹4,50,000/- has been held to be without authority of law – ordinarily, upon it being so held, it is the duty of the Adjudicating Authority/Appellate Authority to ensure that the amounts seized without authority of law are refunded at the earliest; however in the present case the Appellate Tribunal for Foreign Exchange instead of ensuring so, the appellant got refund of the principal amount also after much cajoling;

(ii) The facts of the present case fall in the category (v) as laid down in ***Godavari Sugar Mills Ltd.*** (supra) inasmuch as the facts are not in dispute - the seizure of money was in the nature of tax collected without authority of law and upon it being held so, it became the duty of the respondent to refund the same and the said duty to refund the same is coupled with the duty to refund any accretion thereon. The seizure by the respondent of the sum of ₹4,50,000/- before adjudication was in exercise of the power conferred under the statute; else ordinarily the demand could have been made on the appellant only after adjudication; such power of seizure has to be necessarily read with a corresponding obligation/duty to, upon the person from whom seizure is made being not found liable, to refund the same; during the interregnum the seized goods/money remain with the respondent in trust and/or for the benefit of the person from whom seizure is made, if ultimately not found liable; axiomatically any accretion on the said amount during the time when the money/goods remain in trust would be to the benefit of the owner and cannot be permitted to remain with the respondent who is ultimately found to have wrongly effected the seizure. If it were to be held otherwise, it would tantamount to allowing the benefits/profits so accrued to be retained by the wrongdoer; though action of wrongful seizure is

undoubtedly protected under Section 78 of FERA / Section 44 of FEMA but such protection cannot extend to also reaping benefits therefrom.

9. The Apex Court in *Standard Chartered Bank Vs. The Custodian* (2000) 6 SCC 427 extended the principle of accretion to seizure of shares under the Special Court (Trial of Offences Relating to Transactions in Securities) Act, 1992. We see no reason as to why the said principle should not extend to the facts of the present case also.

10. It is not as if the claim of the appellant for interest requires any adjudication. The appellant from the date of seizure till 1st December, 2009 is claiming only that amount towards interest which the respondent itself has earned on the seized amounts. Significantly, the respondent also did not transfer the seized amount to its own coffers. Being fully aware that the principal amount till adjudication was held by them in trust, the same was kept in a fixed deposit. It is thus not as if the claim of the appellant for which mandamus is claimed requires any adjudication. The only question as aforesaid is whether the respondent having been found to have wrongfully seized and retained the money can also be allowed to retain the benefits

accrued thereon. There is thus no adjudication required for which the appellant needs to be relegated to a Civil Suit.

11. This is more so when the respondent as “State” has to be a model litigant and is not expected to take technical pleas encouraging litigation. The Supreme Court in *State of Maharashtra v. Narayan Vyankatesh Despande* (1976) 3 SCC 404 held that State which has public accountability in respect of its actions should not defend all claims and even those which are plainly and manifestly correct, thereby dragging the opposite party in unnecessary litigation. Similarly, in *State of Maharashtra Vs. Admane Anita Moti* (1994) 6 SCC 109 it was held that State should behave like an enlightened litigant and not like an ordinary person and ought not to defend cases only because the vanity of a particular officer is hurt. To the same effect is *State of Orissa Vs. Orient Paper & Industries Ltd.* (1999) 3 SCC 566. The Supreme Court recently in *Urban Improvement Trust, Bikaner v. Mohan Lal* (2010) 1 SCC 512 reiterated that statutory authorities ought not to raise frivolous and unjust objections, nor act in a callous and high handed manner and cannot behave like some private litigants. It was further held that such bodies are expected to restitute/restore the wrongs committed, upon being found so without requiring unwarranted litigation for the same.

Reference may also be made to *Dilbagh Rai Jarry v. UOI* (1974) 3 SCC 554 & *Madras Port Trust v. Hymanshu International* (1979) 4 SCC 176. Again in *Special Land Acquisition Officer Vs. Karigowda* (2010) 5 SCC 708 it was reiterated that State as litigant has an obligation to act fairly and for the benefit of public at large and to avoid unnecessary litigation.

12. The principle of unjust enrichment also has been correctly invoked by the appellant. To allow State/Government to earn from amounts illegally collected would tantamount undoubtedly to unjust enrichment.

13. Thus a case for maintainability for a writ for mandamus directing the respondents to pay to the appellant the sum of ₹4,42,500/- earned by the respondents as interest from the date of seizure, since held to be illegal, till 1st December, 2009 is made out.

14. We may notice that a Division Bench of the Bombay High Court in *R.K. Jewellers & N.B. Exports Vs. Union of India* MANU/MH/0614/2010 in near identical facts directed payment of the interest earned by respondent to the person from whom monies were seized.

15. As far as the claim of the appellant for interest post 1st December, 2009 on the amount of ₹4,42,500/- is concerned, for the same the principle laid down in *M/s Oriental Enterprises* (supra) squarely applies. The said adjudication cannot be done in writ proceedings. Rule 8 on which reliance is placed would also have no applicability to the said claim. Rule 8 provides for payment of interest at 6% per annum on the principal amount from the date of seizure till the date of payment. However, the appellant herein is claiming interest on the interest of ₹4,42,500/-. For agitating the said claim, writ is not an appropriate remedy. To this extent, we differ from the judgment (supra) of Bombay High Court.

16. The appeal therefore is allowed to the aforesaid extent. The judgment of the learned Single Judge dismissing the writ petition qua the amount of ₹4,42,500/- is set aside and the respondents are directed to within eight weeks hereof pay the said sum of ₹4,42,500/- to the appellant failing which the said amount shall also incur interest at the rate of 10% per annum. However, as far as the claim of the appellant for interest at 10% per annum on the said sum of ₹4,42,500/- from 1st December, 2009 onwards is concerned, the judgment of the learned Single Judge dismissing the writ

petition with liberty to the appellant to institute a suit therefor shall stand.

We also award to the appellant costs of legal proceedings of ₹20,000/- payable by the respondent to the appellant, alongwith the amount aforesaid.

Dasti.

ACTING CHIEF JUSTICE

RAJIV SAHAI ENDLAW, J

JANUARY 13, 2012
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