

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 10.02.2017

CORAM

THE HONOURABLE MR.JUSTICE P.N.PRAKASH

W.P.No.18035 of 2001

M/s.Chemplast Sanmar Ltd.,
No.9, Cathedral Road
Chennai 600 086
Rep.by Secretary

.. Petitioner

Vs.

State of Tamil Nadu
Rep.by Secretary to Government
Prohibition and Excise (III) Dept.,
Secretariat
Chennai 600 005

.. Respondent

Petition filed under Article 226 of The Constitution of India, praying for the issuance of a Writ of Certiorarified Mandamus to call for the records from the respondent culminating with the G.O.Ms.No.166 dated 23.7.2001 and quash the same and direct the respondent to refund the sum of Rs.30,28,260/- being the gallonage fee collected by the respondent on Methanol imported from other countries and had crossed the Customs frontier during 1981 to 1984 together with interest at 12% per annum.

For Petitioner .. Mr.Vijay Narayanan,
Senior Counsel for
Mr.Anand Sashidaran

For Respondents .. Mr.R.Muthukumarasamy,
Advocate General assisted by
Mr.V.Jayaprakash Narayanan,
Special Government Pleader
and Mr.P.D.Aadi Kesavalu

ORDER

This is a third round of litigation before this Court. To appreciate the contentions of the petitioner, it may be necessary to state the facts in detail.

2. The previous avatar of Chemplast Sanmar Limited, the petitioner herein, was 'Mettur Chemicals and Industrial Corporation' (hereinafter would be referred to as "Mettur Chemicals" for the sake of brevity).

3. Admittedly, the Mettur Chemicals was into the manufacture of Caustic Soda, Chlorine, Bleaching Powder, Chloromethanes etc., for which they use Methyl Alcohol (Methanol) as raw material. By the import policy of Central Government, Methanol cannot be imported by private players directly and it can be imported or purchased only through/from two canalizing agencies, viz., State Trading Corporation and Rashtriya Chemicals and Fertilizers Limited. Mettur Chemicals placed orders with the two canalizing agencies and purchased Methanol from them at Bombay and Kandla and transported it to Tamil Nadu during 1981-84.

4. The State of Tamil Nadu charged gallonage fee of 50 paise per bulk litre under Rule 5(ii) of the Tamil Nadu Denatured Spirit and Varnish (French Polish) Rules, 1959 (hereinafter referred to as "Methyl Alcohol Rules" for the sake of brevity). Between 1981 and 1984, Mettur Chemicals made purchases of Methanol from the two canalizing agencies and paid a sum of Rs.30,28,260/- as gallonage fee to the State of Tamil Nadu. By G.O.Ms.No.1182, Prohibition and Excise, dated 4.9.1984, the State of Tamil Nadu, in exercise of powers under section 16 of the Tamil Nadu Prohibition Act, 1937, exempted Methanol from the observance of all the provisions of the said Act.

5. When Mettur Chemicals came to know that the Government had granted exemption by order dated 28.4.1983 to M/s.Southern Synthetics Limited, Ranipet from payment of gallonage fee, Mettur Chemicals made a representation to the Government for refund of the gallonage fee of Rs.30,28,260/- collected from them.

6. The Government by order dated 16.2.1988 rejected the request of Mettur Chemicals on the ground that the said sum was collected on the strength of the rules and orders as they stood at that time. In the said order, the Government had also stated as follows:

"Further, it is presumed that the Corporation would have taken into account the fee paid by it in respect of its imports for 1981-84 while fixing the price of its product."

The order dated 16.2.1988 was challenged by Mettur Chemicals in W.P.No.3025 of 1988 and this Court by order dated 26.2.1997 set aside the order dated 16.2.1988 passed by the Government and

remanded the matter back to the Government for fresh disposal in accordance with law, within 90 days from the date of receipt of the order. It may be relevant to extract paragraph 4 of the order passed by this Court in W.P.No.3025 of 1988 dated 26.2.1997:

"4. The fact of this case will depend upon the validity of the contents of the impugned order passed by the respondent dated 16.2.1988. As observed earlier, the result of the case depends upon the impugned order. The said order runs only to 10 lines. The second part of the order runs as follows: "It is presumed that the Corporation would have taken into account the fee paid by it in respect of its imports for 1984-84 while fixing the price of its product." Therefore, in the impugned order, the respondent has committed in writing that they have presumed certain things. The presumption is not a proof. The impugned order is vague. On presumption, no authority is empowered to pass final orders. Therefore, after considering the contents of the impugned order thoroughly, I am satisfied that it is a fit case where the matter should be remanded to the respondent for fresh disposal, in the light of the observation given by me above."

7. After remand, the Government by order dated 17.6.1997 once again rejected the claim of Mettur Chemicals on the ground that the levy was under Rule 5(ii) of the Methyl Alcohol Rules, 1959 and that it should be construed as inter state import under section 3(7) (b) of the Tamil Nadu Prohibition Act, 1937, r/w Rule 5(ii) of the Methyl Alcohol Rules, which read as under:

"Sec.3 (7) "import" means

- (a) to bring into any local area to which this Act applies from any other local area in the State of Tamil Nadu to which this Act has not been extended; or
- (b) to bring into the State of Tamil Nadu, (including the bringing) across a customs frontier as defined by the Central Government."

Rule 5 - Import:

(i)

(ii) Before the permit for import of denatured spirit/methylated spirit/methyl alcohol or varnish is issued under sub-rule (1) the importer shall pay import permit fee at the rate fixed by the Government from time to time (This has been proposed as provided for in the Tamil Nadu Rectified Spirit Rules, 2000).

Provided that the Government may notification issued whether prospectively or retrospectively make the exemption or reduction in the rate of gallonage fee payable by the person or class of persons."

8. In the order dated 17.6.1997, the Government sought to justify the discrimination alleged by Mettur Chemicals vis-a-vis Southern Synthetics Limited, Trichy Distilleries and Chemicals Limited and Shasun Chemicals (Madras) Limited on the following reasoning:

"The exemption granted to Thiruvalargal Southern Synthetics Limited, Ranipet in Government letter 1st read above, is not a general exemption. In the case of said company (The Southern Synthetics Limited, Ranipet) the exemption was granted from the payment of Gallonage fee on the basis of prior permission. It is immaterial whether the company passes on gallonage fee to the consumers or chooses to absorb the fee itself. The gallonage fee was collected from Thiruvalargal Mettur Chemical and Industrial Corporation Limited with reference to rules and orders as they stood at that time. Exemption from payment of gallonage fee has been given to Thiruvalargal Trichy Distilleries and Chemicals Limited, Tiruchirappalli. Thiruvalargal Shasun Chemicals (Madras) Limited, Madras in the G.O.3rd above during the year 1985-86 to import denatured spirit due to scarcity of alcohol. The said G.O was given effect from the date of its issue. At that time, (i.e.in 1985) methanol has been delinked from the provisions of the Tamil Nadu Prohibition Act, 1937. Hence, the exemption granted to above companies cannot be made applicable to Thiruvalargal Mettur Chemical and Industrial Corporation Limited, Mettur Dam, Salem District. The claim of refund in the instant case has been made after the entire quantity of 3979.03 M.Ts. of Methanol was imported between 1.4.1981 and 4.9.1984 and utilised under the conditions prevailing then. Thiruvalargal Mettur Chemical and Industrial Corporation Limited, have not obtained prior order of the Government exempting the payment of gallonage fee as in the case of M/s.Southern Synthetics Limited."

9. In the mean time, Mettur Chemicals became Chemplast Sanmar Limited and thread was picked up from where it was dropped by starting the second round of litigation before this Court by challenging the order dated 17.6.1997 in W.P.No. 18200 of 1997. In the said writ petition, Chemplast took a stand that

methanol comes within the purview of Entry 52 of List -I (union list) and will not fall within the Entry 8 and Entry 51(a) of List-II (State list). In other words, Chemplast challenged the competency of the State Government to levy gallonage fee on the ground that Methanol is not a liquor used for human consumption and therefore the State Government cannot levy the same. W.P.No.18200 of 1997 was allowed by this Court on 15.6.1998 and the matter was once again remanded to the Government with the following directions:

"6. In fact, these are the various grounds referred to it in the writ petition also. I do not think that any of these legal grounds have been met either in the counter or in the impugned order. In paragraph 4, the argument of the petitioner before it, is extracted. The first argument put forward was regarding the competency of the State Government to levy gallonage fee. I do not find that the authorities have met that argument in any portion of the order. When the jurisdiction of the State Government is questioned, and in that case the levy is challenged, it cannot be simply answered on the ground that on the basis of the existing Rules, it could be levied. I do not find any other reason has been mentioned in the impugned order. I do not find that the various grounds urged by the petitioner before it have been met satisfactorily by the respondent in this case.

7. The earlier order was set aside by a learned Judge on the ground that there were no good reasons and the order was vague. Even now, I feel that the said defect continues."

10. Thereafter, the Government has passed the present order under challenge on 23.7.2001, once again rejecting the claim of the petitioner on the following ground:

" 7. The Government have carefully examined the request of Tvl.Chemplast Sanmar Limited for refund of Rs.30,28,260/- in the light of legal arguments submitted by the Company. The provisions relating to import found in the section 3(7) (b) of the Tamil Nadu Prohibition Act,1937 are as given below:

" (7) "import" means
(a) to bring into any local area to which this Act applies from any other local area in the State of Tamil Nadu to which this Act has not been extended; or

(b) to bring into the State of Tamil Nadu, (including the bringing) across a customs frontier as defined by the Central Government."

It is seen that Tvl.Chemplast Sanmar Limited had not purchased methanol direct from abroad. It is also seen from the copy of the permit issued by then Director of Prohibition and Excise that on the application made by then Tvl.Mettur Chemical and Industrial Corporation, the then Director of Prohibition and Excise permitted them to import by road/rail Methyl alcohol from Bombay/Kandla port in Maharashtra/Gujarat State to Mettur Dam in Tamil Nadu. Hence, the import of methanol by Tvl.Chemplast Sanmar Limited was from Bombay and Kandla ports to Tamil Nadu which is well within the meaning of import as per section 3(7) of the Tamil Nadu Prohibition Act, 1937 (Tamil Nadu Act X of 1937). Methanol or Methyl alcohol is liquor within the meaning of section 3(9) of the Tamil Nadu Prohibition Act, 1937. Hence, the Government consider that the levy of gallonage fee under rule 5(ii) of the Tamil Nadu denatured spirit and varnish (French Polish) Rules, 1959 and its collection from the petitioner is in order. Accordingly, the Government reject the request of Tvl.Chemplast Sanmar Limited for refund of Rs.30,28,260/- (Rupees thirty lakh twenty eight thousand two hundred and sixty only) paid by them as gallonage fee for the import of 3979 tonnes of methanol during 1981-84, as devoid of merits."

Challenging this, Chemplast is before this Court.

11. Heard Mr.Vijay Narayanan, learned Senior Counsel for Chemplast Sanmar Limited and Mr.R.Muthukumarasamy, learned Advocate General for the State of Tamil Nadu.

12. The question of competency of the State Government to levy tax on Methanol is no more *res integra*, in view of the following judgments of the Supreme Court, wherein the Supreme Court has in no uncertain terms held that Methanol would fall within the domain of Union List and therefore, the State Government cannot levy tax thereon:

(a) Synthetics and Chemicals Ltd. v. State of U.P (7 Judge bench) {(1990) 1 SCC 109}

(b) Vam Organic Chemicals Ltd., vs. State of U.P { (1997) 2 SCC 727}

(c) Mohan Meakin Limited vs. State of Himachal Pradesh and others {(2003) 3 SCC 157}

(d) State of Tamil Nadu and another vs. Tvl.South Indian Sugar Mills Association and others {(2015) 13 SCC 748}

(e) Kalyan Chemicals vs. State of Andhra Pradesh and others {(2015) 13 SCC 761}

13. From the above judgments, it is beyond cavil that the State Government does not have the power to levy tax on Methanol and therefore, they cannot take umbrage under Section 3(7) of the Tamil Nadu Prohibition Act r/w Rule 5(ii) of the Methyl Alcohol Rules. However, Mr.Muthukumarasamy, learned Advocate General sought to justify the levy of 50 paise per bulk litre by placing reliance upon the aforesaid judgments, wherein the Supreme Court has stated that the State has got the power to charge gallonage fee/administrative fee for regulating the use of methanol that is brought into the State. In other words, he contended that Methanol should not be diverted for illicit purpose and for conversion to potable alcohol for which the State would incur expenses and the gallonage fee is charged to defray the said expenses.

14. Therefore, the short question that requires to be decided is as to whether the contention put forth by the learned Advocate General finds support from the stand taken by the Government.

15. To appreciate his contention, it may be relevant to extract paragraph No.6 from the judgment of the Supreme Court in *South Indian Sugar Mills Association and others*, [(2015) 13 SCC 748].

"6. We do not propose to make this judgment prolix by once again minutely analysing the several decisions of this Court, which have clarified that administrative or service charges can be recovered, but nothing over and above them; that while it would be unfair to insist on mathematical exactitude in the calculation of administrative service charges, there must be a perceptible correlation between the expenses and the collections; that it will not be permissible for the State to collect fees in respect of expenses incurred in its Excise Department, except those bearing a reasonable nexus with the administrative steps taken to ensure that there is no misutilisation or diversion of industrial alcohol for the purposes of producing potable alcohol." (emphasis supplied)

In the said case, the State of Tamil Nadu charged 50 paise per bulk litre as administrative fee and suddenly enhanced the administrative fee to Rupee one per bulk litre by G.O.Ms.No.64, dated 12.4.2000, which was challenged by the petitioner therein before this Court. A learned single Judge of this Court and a Division Bench of this Court went into the cost expenses factor and held that the sudden hike of rupee one by the State Government was excessive. The State Government took the matter on appeal to the Supreme Court and in that context, the Supreme Court held that there is no infirmity in the order passed by this Court, yet refused to order refund of the differential amount that was illegally collected by the State of Tamil Nadu from the petitioner therein even after the High Court had declared the levy as illegal on the ground that the petitioner therein was not diligently prosecuting the case. However, in this case, the petitioner herein has been diligently assailing the orders passed by the Government from time to time.

16. Mr.Vijay Narayanan, learned senior counsel appearing for the petitioner contended that the impugned order has not considered the specific ground taken by the petitioner that the very levy is violative of the constitutional provisions and had mechanically relied upon the Rule 5(ii) of Methyl Alcohol Rules for justifying the demand and therefore, the said order deserves to be set aside.

17. It is true that the ground on which the impugned order rests cannot be sustained in the light of the aforesaid judgments of the Supreme Court. However, the learned Advocate General, relying upon *Kalyan Chemicals* [(2015) 13 SCC 761] case and *South Indian Sugar Mills* [(2015) 13 SCC 748] case, contended that the levy of gallonage fee and administrative fee have been consistently approved by the Supreme Court. Just because the Government in the impugned order had placed reliance upon Rule 5 (ii) of the Methyl Alcohol Rules for justifying the levy, a mandamus as prayed for, cannot be granted by this Court in the teeth of the aforesaid judgments of the Supreme Court.

18. Per contra, Mr.Vijay Narayanan, learned senior counsel for the petitioner contended that the State Government cannot improve its case from time to time and must either stand or fall on the reasons given in the impugned order and in the counter affidavit filed by the State.

19.To this argument, the learned Advocate General submitted that the said principle will apply only in cases where statutory orders are passed by the authorities and would not cover cases where orders are passed on court directions on the representation made to the authorities. There appears to be some force in the

submission of the learned Advocate General.

20. A reading of *Synthetics and Chemicals Ltd. case*, *Vam Organic Chemicals Ltd. case*, *Kalyan Chemicals case* and *South Indian Sugar Mills Association case* (all cited supra) show that the Supreme Court has been consistently upholding the levy of administrative fee, gallonage fee etc., on the ground that those fees are charged for the State to incur certain expenses for regulating the flow of methanol.

21. Mr. Vijay Narayanan, learned senior counsel for the petitioner contended that the State has not placed before this Court the actual expenses incurred by them for regulating the flow of methanol for justifying the levy of 50 paise as gallonage fee. In the absence of the petitioner, questioning the expenses incurred by the State either in the representation or in the affidavit filed in support of the writ petition, the State cannot be expected to place the expenses incurred by them before this Court, for justifying the levy.

22. As regards the allegation of discrimination, the State has taken a stand that in all those cases, the parties were granted exemption at the inception, but whereas the petitioner is seeking refund, which cannot be granted in the light of the judgements of the Supreme Court in (i) *State of Madhya Pradesh vs. Vyankatlal and another*, [(1985) 2 SCC 544] and (ii) *Mafatlal Industries Ltd., and others vs. Union of India and others*, [(1997) 5 SCC 536].

23. In *Mafatlal Industries case* (cited supra), the Supreme Court has stated as follows:

"108....

(i) ..

(ii) ..

(iii) A claim for refund, whether made under the provisions of the Act as contemplated in Proposition (i) above or in a suit or writ petition in the situations contemplated by Proposition (ii) above, can succeed only if the petitioner/plaintiff alleges and establishes that he has not passed on the burden of duty to another person/other persons. His refund claim shall be allowed/decreed only when he establishes that he has not passed on the burden of the duty or to the extent he has not so passed on, as the case may be." (emphasis supplied).

24. In the earliest order dated 16.2.1988, the State Government raised a presumption that the petitioner must have

included the gallonage fee paid by them in the price of the product. Though the said order was set aside by this Court in W.P.No.3025 of 1988, yet the petitioner did not plead either in the subsequent representation or in the affidavit filed in support of the writ petition that they had not passed on the burden to their customers. This aspect has been emphasized in Mafatlal Industries case (supra). The burden is on the petitioner to show to the court via pleadings that they had not included the gallonage fee paid by them to the Government in the sale price of the product. In the absence of this specific pleading, it will not be incorrect to infer that the petitioner has passed on the burden of the gallonage fee paid by them to their customers, thereby disentiitling them to refund.

25. Though this Court is in agreement with the contention of Mr.Vijay Narayanan, learned senior counsel for the petitioner that the State Government cannot levy tax or excessive fee, be it gallonage fee or administrative fee, on methanol, in the light of the Supreme Court having confirmed the levy of 50 paise per bulk litre in *South Indian Sugar Mills Association* case, this Court cannot take a different view and hold that 50 paise per bulk litre is excessive.

26. In the result, this writ petition stands dismissed. No costs.

-s/d-

Assistant Registrar

True Copy

Sub-Assistant Registrar

ajr

To

The Secretary to Government
Prohibition and Excise (III) Dept.,
Secretariat, Chennai 600 005

+1 CC to Mr.R.Sachidanam, Advocate Sr.No.9335.

+1 CC to Government Pleader, High Court, Chennai Sr.No.9048.

W.P.No.18035 of 2001

NRI (CO)
KP(07.03.2017)