

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 24.08.2018

CORAM:

THE HONOURABLE MR.JUSTICE T.S.SIVAGNANAM

Writ Petition No.9855 of 2018
and W.M.P.Nos.11782 of 2018

Orders reserved on 02.08.2018	Orders pronounced on 24.08.2018
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Mrs.Loganayaki

.. Petitioner

vs.

1.The State of Tamil Nadu,
Rep., by its Secretary,
Prohibition and Excise Department,
Fort St., George, Chennai - 600 009.

2.The District Collector,
Coimbatore.

3.The Deputy Commissioner (Excise),
Coimbatore.

4. The Divisional Excise Officer,
Coimbatore South,
Divisional Excise Officer Office,
North Thasildar Office Compound,
Coimbatore - 641 018.

.. Respondents

Petitions filed Under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari to call for the entire records relating to the impugned Notice dated 19.12.2017, in Na.Ka.No.217/99/A, issued by the fourth respondent and quash the same.

For Petitioner : Mr.M.N.Balakrishnan

For Respondents: Mr.R.P.Prathap Singh GA for RR1to4

O R D E R

The petitioner seeks for issuance of a Writ of Certiorari, to quash the impugned demand notice issued by the fourth respondent, Divisional Excise Officer, Coimbatore South, Coimbatore, demanding a sum of Rs.15,03,911/-, claiming to be the notional loss for the loss of sale of Arrack in respect of Arrack shop Nos.42,45 & 48 for the Excise year 1982-83.

2. A partnership firm under the name and style of M/s.Sakthiman Enterprises was formed during the year 1982, consisting of three partners of whom the petitioner's husband Mr.Nithyanandam, was one of the partners. The petitioner's husband died during 1990 and the other two partners also subsequently passed away and the firm stood automatically dissolved. The respondent department issued auction notice, dated 25.05.1982, for bringing for sale by public auction, the right to sell liquor through retail vending units in respect of several shops in Coimbatore Municipality town area. The said firm was declared as a successful bidder in respect of four shops, namely, shop Nos.63,42,45 & 48. Insofar as shop No.63, since the location was a thickly populated area, there was difficulty in identifying an unobjectionable place to locate the shop and the location chosen by the petitioner, was rejected by the department for various reasons, as a result, the firm was unable to find a suitable location. In the mean time, a notice was issued on 01.02.1983, bringing the shop No.63, for re-auction. This notice was put to challenge by the firm in O.S.No.297 of 1983, before the District Munsif, Coimbatore. During the pendency of the Suit, since the Excise year had expired, the Suit was dismissed as infructuous on 20.12.1991. The firm demanded refund of a sum of Rs.2,40,000/-, paid as deposit, which was not acceded to and on the contrary, the respondent department demanded payment of notional loss for not only shop No.63, but also for shop Nos.42, 45 & 48 to the tune of Rs.7,20,000/-. The firm filed W.P.No.6656 of 1996, to direct the respondents to refund the deposit amount paid by the firm, which was dismissed by order dated 17.02.1993, stating that the liability existing between the parties, can be worked out in accordance with law at the appropriate stage. The third respondent issued notice, dated 30.06.1994, calling upon the firm to deposit a sum of Rs.13,63,384/- on or before 10.07.1994. By then, all the three partners died and the petitioner was left alone to agitate the matter. Having left with no other option, the petitioner filed a Writ Petition in W.P.No.12279 of 1994, challenging the demand notice, dated 30.06.1994. The Court by order dated 19.03.2001, directed the petitioner to make a representation and the same to be considered within a time frame. Accordingly, the representation was made by the petitioner on 05.05.2001, stating that the fourth respondent has no jurisdiction to decide the question of notional loss and without taking a decision on the said objection, notice dated 27.07.2000, was issued calling upon the petitioner to attend an enquiry, which was put to challenge by the petitioner in O.S.No.1677 of 2001 and while the Suit was pending, an order was passed by the second respondent, dated 28.02.2002, directing the petitioner to pay a sum of Rs.13,63,384/- towards notional loss and Rs.12,34,289/- towards penalty. Since an order came to be passed, O.S.No.1677 of 2001, was not contested and was dismissed

for default on 13.10.2003. Once again the petitioner approached the Civil Court in O.S.No.3069 of 2004, challenging the order dated 28.02.2002, as null and void, which Suit was dismissed for default on 04.05.2006. Immediately, the respondents issued a public auction notice, dated 15.12.2004, bringing the petitioner's immovable property for sale for recovery of the said amounts. On coming to know of the said auction notice, the petitioner appeared before the fourth respondent and gave a written undertaking that the entire notional loss would be cleared by her in monthly installments of Rs.20,000/- each. The petitioner accordingly, paid a sum of Rs.6,43,384/- being the notional loss in respect of the three shops namely, shop Nos.42, 45 & 48 and interest of Rs.1,89,100/-. It is thereafter the impugned notice has been issued by the fourth respondent directing payment of penal interest on the said amounts failing which threatened, action under the Revenue Recovery Act.

3. Mr.M.N.Balakrishnan, learned counsel appearing for the petitioner submitted that the impugned notice is arbitrary and illegal, as the fourth respondent has no jurisdiction and authority to invoke the provisions of the Revenue Recovery Act and in terms of Section 4 of the Act, it is either the District Collector or the officials empowered by him alone, who could proceed under the said Act and the impugned demand raised by the fourth respondent under the provisions of the Revenue Recovery Act is without jurisdiction. Further, it is submitted that penal interest cannot be demanded invoking the provisions of the Revenue Recovery Act, more so, when the petitioner has paid the entire notional loss and interest thereon. In support of his contention, the learned counsel placed reliance on the decision of this court in Saradhambal vs. The Excise Officer & Anr., [W.P.No.25599 of 2005], dated 13.07.2016.

4. Mr.R.P.Prathap Singh, learned Government Advocate, after narrating the factual position, much of which has been placed before this Court by the petitioner, submitted that final order was passed by the District Collector, calculating the notional loss amount to be remitted by the Ex-Licencee as Rs.25,97,673/-. The petitioner had repeatedly approached the Civil Court and was unsuccessful and the Suits filed by the petitioner is not maintainable in view of the express bar contained in Section 56B of the Tamil Nadu Prohibition Act, 1957. It is submitted that the Government in G.O.Ms.No.81, Prohibition Excise Department, dated 05.04.2004, directed that interest should be levied on belated payment and based on the said Government Order, the interest was worked out at Rs.16,93,011/-. Therefore, the fourth respondent has issued impugned notice demanding the said amount in terms of the said Government Order. Thus, it is submitted that the only intention of the petitioner is to drag on the matter and to delay the recovery proceedings. It is further submitted that if the petitioner disputes the figures

mentioned in the impugned notice, she should have approached the fourth respondent and produced the challans to establish her case instead she has approached this Court by way of this Writ Petition without any bonafides. With the above submissions, the learned Government Advocate prayed that the impugned notice may be sustained.

5. Heard Mr.M.N.Balakrishnan, learned counsel for the petitioner and Mr.R.P.Prathap Singh, learned Government Advocate for the respondents and perused the materials placed on record.

6. The short issue which falls for consideration is whether the respondents can demand penal interest/interest at the rates fixed by the Government by G.O.Ms.No.81, dated 05.04.2004, on the belated payment of the notional loss.

7. Admittedly, the Government Order was passed only in the year 2004, whereas the licence granted to the erstwhile firm was for the Excise year 1982-83. The fourth respondent in the counter affidavit has not stated that the Government Order is retrospective. Even assuming, it is so, what is sought to be recovered is the penal levy given the nomenclature as interest. Thus, what is sought to be recovered from the petitioner is the penalty termed as interest for the belated payment. Admittedly, the decision of the Government to levy interest is an executive order, not a statutory rule or a regulation. Therefore, the said Government Order cannot be made retrospective to be made applicable to the relevant Excise year 1982-83. Furthermore, when there is a direction to levy penal charges on a licensee, the same cannot be made retrospective, as it would tantamount to change of the licence conditions. In the counter affidavit, there is an averment stating that the Government has issued notification specifying the rate of interest to be recovered on the amounts due to the State Government under the provisions of the Tamil Nadu Prohibition Act and the Rules made thereunder and the rate of interest was fixed at 12%. It is further stated that in terms of G.O.Ms.No.81, dated 05.02.2004, the rate of interest has been fixed at 5%. The respondents have not placed before this Court, the terms and conditions of the licence granted in favour of the firm. Even assuming that there was a condition to levy interest for belated payment, the same cannot be at the rates fixed by the Government in G.O.Ms.No.81, as the said Government Order was issued much after the expiry of the Excise year.

8. One more aspect, which is peculiar to the case on hand is that the petitioner was granted liberty to remit the entire arrears of notional loss in installments. At the time when the installment payments were accepted by the respondent department, there was no refusal to accept the payment in installments and insisted the petitioner to pay the entire amount in one lumpsum.

Thus, the delay in remitting the notional loss is deemed to have been condoned by the respondents on account of the indulgence granted by the petitioner to remit the amounts in installments. What is interesting to note is that apart from the payment of entire notional loss, the respondents have also collected a sum of Rs.1,89,100/- towards interest. In such circumstances, the respondent cannot now demand interest at the rates fixed by the Government in G.O.Ms.No.81, which was issued in the year 2004. From the tabulated statement found in the impugned notice, it appears that whatever remittances were made by the petitioner towards the arrears of notional loss appears to have been adjusted against notional loss and interest, for which there was no specific written consent from the petitioner nor the petitioner was informed as to how such adjustment has been made. In spite of the said factual position, the petitioner has remitted the entire notional loss for the three shops along with interest, which according to the petitioner is in full and final settlement of all payments.

9. Thus, for all the above reasons and more particularly in the peculiar facts and circumstances of this case, this Court is of the considered view that the impugned demand notice is unenforceable, as the petitioner has paid the entire notional loss along with interest in respect of all the three shops, which was licenced to a partnership firm, and which has become default.

10. In the result, the Writ Petition is allowed and the impugned demand notice is quashed. No costs. Consequently, connected Miscellaneous Petition is closed.

-s/d-

Deputy Registrar

True Copy

Sub-Assistant Registrar

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To

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Rep., by its Secretary,
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SP(06/09/2018)



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