IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 02.07.2019

CORAM

THE HONOURABLE MR. JUSTICE M.SUNDAR

W.P.No.11369 of 2019
and
W.M.P.Nos.11685 & 11686 of 2019

N.Suseela ..Petitioner

vs.

1. The Commissioner (Prohibition and Excise)
   Chepauk, Chennai 600 005.

2. The Deputy Commissioner (Excise)
   Office of Deputy Commissioner, (Excise)
   Coimbatore.

3. The Divisional Excise Officer,
   Pollachi,
   Coimbatore district.

4. The District Collector of Coimbatore,
   Collectorate, Coimbatore. ..Respondents

Writ Petition filed under Article 226 of the Constitution of India praying for issuance of a Writ of Certiorari calling for the records relating to the memo of the 2nd respondent namely the Deputy Commissioner (Excise), Coimbatore dated 14.08.2018 in SR.6/94/Kela 2 and quash the same.

For Petitioner : Mr.N.E.A.Dinesh

For Respondents : Mr.R.Pratap Singh
Government Advocate

ORDER

Mr.N.E.A.Dhinesh, learned counsel on record for the writ petitioner and Mr.R.P.Pratap Singh, Government Advocate on behalf of the four official respondents are before this Court.

2. All the four respondents have filed a common counter affidavit dated 06.06.2019 and therefore, pleadings are complete.

3. With consent of learned counsel on both sides, main writ petition is taken up, heard out and is being disposed of.

4. Subject matter of instant writ petition is auction for running a arrack shop being A.S.No.28, Pollachi Town, Coimbatore District (hereinafter referred as 'said Shop' for the sake of brevity).

5. The respondents, on 17.06.1982 conducted an auction to sell arrack in said Shop. Writ petitioner's husband one Mr.K.Natarajan participated in the auction but the auction was not confirmed. Re-auction was held on 21.06.1982 and writ petitioner's husband again participated in the auction but the auction was not confirmed by the respondent. Thereafter successive reauctions were held on 26.06.1982, 29.06.1982, 13.07.1982, 09.08.1982 and 07.09.1982. With the exception of auction on 13.07.1982, there were no bids in the other re-auctions. In 13.07.1982 re-auction, writ petitioner's husband Mr.K.Natarajan bid for Rs.33,000/- qua said Shop.

6. Ultimately after such a successive re-auctions, on 07.09.1982, the District Collector of Coimbatore confirmed the auction in favour of writ petitioner's spouse on 13.07.2019, but writ petitioner's spouse informed his inability to accept the confirmation as it was confirmed belatedly after a lapse of more than 2 ½ months after holding several re-auctions. Writ petitioner's husband submitted that he was not interested in running said Shop and requested to return the deposit amount of Rs.16,500/- and another sum of Rs.1,000/-. However this request was not acceded to and the deposit amount was ordered to be forfeited.

7. Writ petitioner's spouse filed writ petition in W.P.No.7925 of 1987 in this Court with regard to the aforesaid forfeiture but the same came to be dismissed for default on 18.01.1997. This Court is informed that writ petitioner's spouse was very ill and he ultimately died on 30.05.2000. It is also submitted that the writ petitioner's spouse could not pursue the aforesaid writ petition, owing to his serious illness.

8. Thereafter the Divisional Excise Officer, Pollachi (respondent no.3) initiated proceedings and passed an order dated 10.08.2005 being ref.No.e.f.No.10337/85/m stating that there is a notional loss of Rs.1,96,743/- (Rupees one lakh ninety six thousand seven forty three only)

9. Thereafter in her capacity as legal heir i.e., spouse, writ petitioner appeared before the authority concerned and left with hobson's choice, agreed to pay the aforesaid sum of little over Rs.1,96,000/- in monthly instalments. There is no

disputation before this Court that the entire sum of little over Rs.1,96,000/- (Rs.1,96,743/- be precise) has been duly paid by writ petitioner by way of monthly instalments by the writ petitioner.

10. Thereafter more than 13 years later, the 2nd respondent passed an order dated 14.08.2018 bearing ref.No.v!;-Mh;/6-94-bfs2 (hereinafter 'impugned order' for brevity). Vide the impugned order, 2nd respondent referred to the aforesaid notional loss which was duly paid by the writ petitioner and held that the writ petitioner is liable to pay interest on the same.

11. To be noted, with regard to the earlier proceedings dated 10.08.2005, there is no mention about interest and even when the writ petitioner agreed to pay the aforesaid sum in instalments, there is no mention about the interest component.

12. Under the aforesaid circumstances, instant writ petition has been filed, assailing impugned order mulcting writ petitioner with interest.

13. Learned counsel for writ petitioner submitted that there is no provision for imposing notional loss. There is no provision that has been placed before this Court demonstrating any legal basis for the respondents to claim notional loss much less notional loss under the aforesaid circumstances. However with regard to interest, a Government order being G.O.Ms.No.81 dated 05.04.2004 has been pressed into service. There is reference to this Government order in paragraph no.6 of the common counter affidavit filed by the respondents.

14. A perusal of this Government Order also brings to light that it does not talk about any notional loss and it only talks about interest on monies dues and payable to the Department.

15. Further more, learned counsel for petitioner drew the attention of this Court to two orders being orders dated 13.07.2016 and 24.08.2018 made in W.P.Nos.25599 of 2005 and 9855 of 2018 respectively by another Hon'ble Single Judge.

16. Adverting to the aforesaid orders, learned counsel for petitioner submitted that these writ petitions, arose under similar circumstances and a Hon'ble Single Judge of this Court held in favour of the writ petitioner.

17. A perusal of the aforesaid orders, more particularly, the latter order being order dated 24.08.2018 in W.P.No.9855 of 2018 brings to light that this Court has taken a view that interest cannot be levied. Under these circumstances the Government order being G.O.Ms.No.81 is of the year 2004 whereas

the excise year which forms subject matter of the instant writ petition as well as the writ petitions qua the other two orders is 1982-83.

18. There is absolutely no difficulty in accepting the submission of the writ petitioner and taking the same view as in the earlier order made by another Hon'ble Single Judge that interest cannot be demanded as the aforesaid Government order is dated 05.04.2004 whereas the instant writ petition pertains to excise year 1982-83.

19. Besides the aforesaid point, two other points which enure to the benefit of the writ petitioner are that there is no provision for imposing notional loss under the Statute and the aforesaid Government order is an executive order which cannot override statutory provisions. In any event, in the absence of any statutory provision regarding powers to impose notional loss, the impugned order is certainly not sustainable.

20. One other aspect that comes into sharp focus in the instant case is that there is no disputation or disagreement that the writ petitioner's spouse at the time of auction made a deposit which is in the nature of 'Earnest Money Deposit' ('EMD' for brevity). As the writ petitioner did not accept the auction that was confirmed in his favour owing to successive re-auctions and owning to delay in confirmation of the auction, forfeiture of EMD was ordered and EMD was forfeited. One also has to bear in mind that there were as many as 7 re-auctions held for the same excise year namely 1982-83 for the seven said Shop and out of these seven re-auctions, in as many as 3 re-auctions, there were no bidders at all and in one re-auction held on 21.06.1982, writ petitioner's spouse was the sole bidder.

21. Be that as it may, once forfeiture of EMD has been ordered, once there is forfeiture, there is nothing to show that notional loss can be claimed particularly in the absence of any legal provision for the same. There are no covenants in the auction notice or in the terms of the auction which has been placed before this Court which gives a right to the respondents to mulct the writ petitioner with notional loss.

22. In the light of the narrative thus far, this Court is convinced that the impugned order does not stand the test of law and is liable to be setaside.

23. This Court is informed that pursuant to the interim order in the instant writ petition, writ petitioner has thus far paid a sum of Rs.29,000/-. As the impugned order is being held to be not sustainable and as the same is being set aside, though obvious, it is made clear that the writ petitioner is entitled

to refund of the said sum which shall be made by the 3rd respondent within 3 months from the date of receipt of a copy of this order.

24. This Court has also taken note of the fact that the entire sum of little over Rs.1,96,000/- has been duly paid by the writ petitioner, though there is no provision for notional loss. Even if there is provision for notional loss, interest on the basis of G.O.No.81 dated 05.04.2004 cannot be mulcted on the writ petitioner with regard to excise year 1982-83.

25. This writ petition is allowed. No costs. Consequently connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

sk

To

1. The Commissioner (Prohibition and Excise)
   Chepauk, Chennai 600 005.

2. The Deputy Commissioner (Excise)
   Office of Deputy Commissioner, (Excise)
   Coimbatore.

3. The Divisional Excise Officer,
   Pollachi,
   Coimbatore district.

4. The District Collector of Coimbatore,
   Collectorate, Coimbatore.

+1 cc to Mr.V.Nicholas, Advocate, S.R.No.55549

+1 cc to the Government Pleader, S.R.No.55414

W.P.No.11369 of 2019

NRL(CO)
SSM(01/08/2019).