

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

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CWP-4626-2019 (O&M)
Date of Decision: 14.02.2024

EX NAIK BHAG CHAND

...PETITIONER

Versus

DIRECTOR GENERAL OF POLICE, CRPF AND ORS

--- RESPONDENTS

CORAM: HON'BLE MR. JUSTICE JAGMOHAN BANSAL

Present: Mr. Sukhdev Singh Gopera, Advocate
for the petitioner.

Mr. Karan Kumar Jund, Senior Panel
for respondents No.1 to 5- UOI

Mr. Mahesh Dheer, Advocate and
Mr. Dheeraj Siwach, Advocate
for respondents No.6 to 8.

JAGMOHAN BANSAL, J. (Oral)

1. The petitioner through instant petition under Articles 226/227 of the Constitution of India is seeking direction to respondents not to effect recovery with respect to already paid pensionary benefits.
2. The respondent vide communication dated 23.05.2017 (Annexure P-16) has ordered for recovery of excess pension drawn by Bhag Chand-petitioner.

3. Mr. Sukhdev Singh Gopera, counsel for the petitioner would submit that during the pendency of petition, the petitioner has passed away and his wife passed away earlier.

4. Mr. Karan Kumar Jund, Senior Panel Counsel, submits that no recovery of excess payment can be made from LR's of deceased employee.

5. Learned counsel for the respondent-bank asserts that a sum of Rs. 97,754/- was recovered from deceased employee and remaining amount is yet to be recovered.

Faced with statement made by learned counsel for the respondent-UOI, Mr. Mahesh Dheer, Advocate submits that deceased employee had furnished undertaking and as per said undertaking, bank can recover excess payment even from legal heirs.

6. During the pendency of present petition, Bhag Chand-petitioner has passed away. His wife is also no more. The matter was adjourned twice to bring on record LR's, however, till date, there is no application of LR's. As per State, amendment of Sub-rule (2) of Rule 3 of Order XXII of CPC, the petition does not abate against the petitioner. The respondent-bank is claiming that they have right to recover excess payment of pension from legal heirs of the deceased employee. To resolve the issue and put the litigation to rest, I think it appropriate to adjudicate the issues raised by parties.

7. Supreme Court in **State of Punjab Vs. Rafiq Masih (White Washer) etc 2015 (4) SCC 334** has laid down circumstances where no recovery can be effected from an employee despite excess payment. The circumstances enumerated in the judgment are not conclusive. The

circumstances where the Court has categorically held that no recovery shall be effected are reproduced as below :

“18. It is not possible to postulate all situations of hardship which would govern employees on the issue of recovery, where payments have mistakenly been made by the employer, in excess of their entitlement. Be that as it may, based on the decisions referred to hereinabove, we may, as a ready reference, summarise the following few situations, wherein recoveries by the employers, would be impermissible in law:

- (i) Recovery from the employees belonging to Class III and Class IV service (or Group C and Group D service).*
- (ii) Recovery from the retired employees, or the employees who are due to retire within one year, of the order of recovery.*
- (iii) Recovery from the employees, when the excess payment has been made for a period in excess of five years, before the order of recovery is issued.*
- (iv) Recovery in cases where an employee has wrongfully been required to discharge duties of a higher post, and has been paid accordingly, even though he should have rightfully been required to work against an inferior post.*
- (v) In any other case, where the court arrives at the conclusion, that recovery if made from the employee, would be iniquitous or harsh or arbitrary to such an extent, as would far outweigh the equitable balance of the employer's right to recover.”*

(emphasis supplied)

8. Hon'ble Supreme Court in **State of Punjab vs. Jullundur Vegetables Syndicate (1966) 2 SCR 457** while dealing with recovery of sales tax dues has held that recovery in the absence of specific provision in the Act cannot be made from legal heirs of a dealer. The said opinion has been reiterated by Supreme Court in **Shabina Abraham and others vs. Collector of Central Excise and Customs, (2015) 34 GSTR 146** while dealing with recovery under Central Excise Act, 1944. The Supreme Court has clearly held that in the absence of statutory provision, no recovery can be effected from legal heirs of an individual. As there is no provision under Central Excise Act, no recovery can be effected from legal heirs of a deceased assessee. The relevant extracts of the judgment of Supreme Court in **Shabina Abraham's case (supra)** read as:

"Nothing is certain except death and taxes". Thus spoke Benjamin Franklin in his letter of November 13, 1789 to Jean Baptiste Leroy. To tax the dead is a contradiction in terms. Tax laws are made by the living to tax the living. What survives the dead person is what is left behind in the form of such person's property. This appeal raises questions as to whether the dead person's property, in the form of his or her estate, can be taxed without the necessary machinery provisions in a tax statute. The precise question that arises in the present case is whether an assessment proceeding under the Central Excises and Salt Act, 1944, can continue against the legal representatives/estate of a sole proprietor/ manufacturer after he is dead. The facts of the case are as follows.

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23. The question that arose in the aforesaid case was whether a dissolved firm could be reassessed to sales tax in respect of its pre-dissolution turnover. By a two to one (2:1), decision, this court held that the Bombay Act contained the necessary

provisions to reassess such a dissolved firm in respect of its pre-dissolution turnover. The majority judgment referred to the definition of "dealer" in the Bombay Act of 1953 and referred to this court's judgment in State of Punjab v. Jullundur Vegetables Syndicate. We find that the majority judgment of this court relied heavily on the fact that dishonest persons may dissolve a firm in order to escape liability to assessment of taxes legitimately due from them but which have escaped assessment. In paragraph 19, the majority held :

"It is plausible that a distinction ought to be made between the death of an individual and the dissolution of a firm. Human beings, as assesseees, are not generally known to court death to evade taxes. Death, normally, is not volitional and it is understandable that on the death of an individual, his liability to be assessed to tax should come to an end unless the statute provides to the contrary. With firms it is different, because a firm which incurs during its existence a liability to pay sales tax may, with a little ingenuity, evade its liability by the voluntary act of dissolution. The dissolution of a firm could, therefore, be viewed differently from the death of an individual and the partners could be denied the advantage of their own wrong. But we do not want to strike this new path because the Jullundur case and the two cases which follow it have likened the dissolution of a firm to the death of an individual. Let us, therefore, proceed to examine the other provisions of the 1953 Act."

It then went on to quote section 15(1) of the Bombay Sales tax Act, 1953 and then arrived at this conclusion :

"22. Section 15(1) contains an important clause that action thereunder can be taken by the Collector after giving a notice to the assessee under section 14(3) of the Act within the prescribed period. Once such a notice is

given, the Collector gets the jurisdiction to assess or reassess the amount of tax due from the dealer and all the provisions of the Act 'shall apply accordingly as if the notice were a notice served under' section 14(3). Section 14(3) speaks of the power of the Collector to assess the amount of tax due from the dealer after giving notice to him, if the Collector is not satisfied that the returns furnished are correct and complete. The jurisdiction to assess or reassess which is conferred by section 15(1) is thus equated with the original jurisdiction to assess the dealer under section 14. By this method, the continuity of the legal personality of the assessee is maintained in order to enable the assessment of turnover which has escaped assessment. It is no answer to a notice under section 15 that the partners having dissolved the firm, the assessment cannot be reopened. It puts a premium on one's credulity to accept that having created a special jurisdiction to assess or reassess an escaped turnover, the Legislature permitted that salutary jurisdiction to be defeated by the device of dissolution. The argument of the appellants really comes to this : suppress the turnover, evade the sales tax, dissolve the firm and earn your freedom from taxation."

The court then went on to add :

"24. Section 15A confers on the Collector analogous powers to assess or reassess a dealer for taxes due prior to November 21, 1956 when the States were reorganised, if either no assessment was made for the prior period or if any turnover had escaped assessment. This provision, like the one contained in section 15, is of general application and makes no exception in favour of dissolved firms. Therefore, if a firm was not assessed prior to the reorganisation of States or if any part of its turnover had escaped assessment, it is competent to the

Collector to assess or reassess the firm notwithstanding its subsequent dissolution. This is the necessary implication of section 15A. It must follow as a corollary that the power to rectify a mistake apparent from the record can be exercised by the Collector under section 35 of the Act of 1953 even after the dissolution of an assessed firm, though on conditions specified in the section. The section contains a compelling implication that evident errors can be corrected no matter whether the firm is in existence or is dissolved. Dissolution is not a panacea for liability to pay sales tax."

It also added in paragraph 32 :

*"It is indisputable that the first appellant-firm was liable to be charged to sales tax on its business turnover. The charging provisions are contained in Chapter III of the Act of 1953 and Chapter II of the Act of 1959. In this appeal, we have to construe the machinery provisions of those Acts. In accordance with the view taken in the cases cited above, the machinery sections ought to be construed so as to effectuate the charging sections. The construction which we have placed on the machinery provisions of the 1953 Act will give meaning and content to the charging sections, in the sense that our construction will effectuate the provision contained in the charging sections. The resourcefulness and ingenuity which go into well-timed dissolution of firms ought not to be allowed to be used as convenient instruments of tax evasion. As observed by Lord Dunedin in *Whitney v. Commissioners of Inland Revenue* : 'A statute is designed to be workable, and the interpretation thereof by a court should be to secure that object, unless crucial omission or clear direction makes that end unattainable.' Far from there being any crucial omission or a clear direction in the present case which would make the end unattainable,*

the various provisions to which we have drawn attention leave it in no doubt that a dissolved firm can be assessed on its pre-dissolution turnover."

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27. The argument that section 11A of the Central Excises and Salt Act is a machinery provision which must be construed to make it workable can be met by stating that there is no charge to excise duty under the main charging provision of a dead person, which has been referred to while discussing section 11A read with the definition of "assessee" earlier in this judgment.

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29. The learned counsel for the Revenue also cited Girja Nandini Devi v. Bijendra Narain Choudhury (1967) 1 SCR 93 at paragraph 15 and Rameshwar Manjhi v. Management of Sangramgarh Colliery (1994) 1 SCC 292 at paragraph 12, in support of the general principle that an action begun in a court of law by a person does not cease with his death. The context of both decisions was very different. The first decision was in the context of proceedings in relation to partition of a joint family whereas the second was under the Industrial Disputes Act. Neither judgment has any direct bearing on the controversy before us.

30. It remains to consider a judgment cited by the learned counsel for the appellants, namely, CCE v. Dhiren Gandhi (2012) 281 ELT 64 (Karn). This judgment is correct in its conclusion that while interpreting the provisions of the Central Excises and Salt Act, legal heirs who are not the persons chargeable to duty under the Act cannot be brought within the ambit of the Act by stretching its provisions. To the extent that this judgment holds what is set out hereinbelow, it is correct :

"We do not find any provision in the Act which foists any such liability in the case of intestate succession. In other words, there is no provision which empowers the authorities to recover due from a deceased assessee by

proceeding against his legal heirs. The way sections 11 and 11A are worded, it is amply clear, the Legislature has consciously kept away the legal heirs from answering to liabilities under the Act." (at page 69)

31. The impugned judgment in the present case has referred to Ellis C. Reid but has not extracted the real ratio contained therein. It then goes on to say that this is a case of short-levy which has been noticed during the lifetime of the deceased and then goes on to state that equally, therefore, legal representatives of a manufacturer who had paid excess duty would not by the self-same reasoning be able to claim such excess amount paid by the deceased. Neither of these reasons are reasons which refer to any provision of law. Apart from this, the High Court went into morality and said that the moral principle of unlawful enrichment would also apply and since the law will not permit this, the Act needs to be interpreted accordingly. We wholly disapprove of the approach of the High Court. It flies in the face of first principle when it comes to taxing statutes. It is, therefore, necessary to reiterate the law as it stands. In Partington v. Attorney General [1869] LR 4 HL 100 at 122, Lord Cairns stated :

"If the person sought to be taxed comes within the letter of the law he must be taxed, however great the hardship may appear to the judicial mind to be. On the other hand, if the crown seeking to recover the tax, cannot bring the subject within the letter of the law, the subject is free, however apparently within the spirit of law the case might otherwise appear to be. In other words, if there be admissible, in any statute, what is called an equitable, construction, certainly, such a construction is not admissible in a taxing statute where you can simply adhere to the words of the statute."

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34. We are, therefore, of the view that this appeal must be allowed and the judgment of the High Court of Kerala is, accordingly set aside and that of the learned single judge restored.

9. In the case in hand, as confirmed by counsel for the petitioner, the wife of the deceased employee has already passed away and children being major are not entitled to family pension, thus, state is not paying family pension to any family member of the deceased employee. The respondent-UOI has conceded that no recovery can be effected from legal heirs of deceased employee, however, bank is disputing on the ground that deceased employee had furnished undertaking. The undertaking, if any, furnished by deceased employee was binding upon him and in the absence of any statutory provision, it cannot create liability of legal heirs.

The Supreme Court in above-cited judgments has held that even tax cannot be recovered from legal heirs of a proprietorship concern if there is no statutory provision. An employee gets pension under the statutory provisions. The right of pension has been recognised as constitutional right in terms of Article 300-A of Constitution of India. It is apt to notice that prior to omission of clause (f) of article 19(1) of the Constitution of India, it was considered as fundamental right.

10. This Court everyday is getting similar cases where there is excess payment on account of mistake on the part of bank. The employer i.e. Union of India or State Government is not at fault whereas it is bank who is at fault and claiming that excess payment has been made on account of its mistake. There is no case whereas it has been found that mistake was on the part of employee. In every case, there is mistake on the part of bank. The

bank has initiated recovery even against more than 80 years old widow. It ill behoves the banks.

11. In the above backdrop, this Court is of the considered opinion that the present petition deserves to be disposed of with a direction that no further recovery shall be effected from the legal heirs of the petitioner (deceased).

(JAGMOHAN BANSAL)
JUDGE

14.02.2024
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<i>Whether speaking/reasoned</i>	<i>Yes</i>
<i>Whether reportable</i>	<i>Yes</i>