

Shiv Kumar and ors. Vs. Collector and ors.

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Court : Allahabad

Decided On : Nov-09-2004

Reported in : 2005(1)AWC998

Judge : R.K. Agrawal and ;K.N. Ojha, JJ.

Acts : [Uttar Pradesh Excise Act, 1910](#) - Sections 38A; Punjab Excise Act; Uttar Pradesh Excise (Amendment) Act, 1985; Uttar Pradesh Sales Tax Act - Sections 8(1A); Uttar Pradesh Sugarcane Cess Act, 1956 - Sections 3(3); Bengal Finance (Sales Tax) Act, 1941 - Sections 10A; Capital of Punjab (Development and Regulation) Act, 1952 - Sections 3; [Constitution of India](#) - Article 226

Appeal No. : C.M.W.P. No. 964 of 1999

Appellant : Shiv Kumar and ors.

Respondent : Collector and ors.

Advocate for Def. : S.P. Kesarwani, C.S.C.

Advocate for Pet/Ap. : Mukesh Prasad, Adv.

Disposition : Petition dismissed

Judgement :

R.K. Agrawal, J.

1. By means of the present writ petition filed under Article 226 of the [Constitution of India](#) the petitioners who are four in number, seek the following reliefs :

(i) To issue a writ, order or direction in the nature of certiorari quashing the recovery certificate dated 29.7.1999, issued by respondent No. 1 (Annexure II).

(ii) To issue a writ, order or direction in the nature of mandamus directing the respondents not to recover the amount of interest from the petitioners.

(iii) To issue any other writ order or direction which this Hon'ble Court deems fit and proper in the circumstances of the case.

(iv) To award cost of the petition to the petitioners.'

2. Briefly stated the facts giving rise to the present writ petition are as follows :

'According to the petitioners, during the excise year 1976-77 the father of the petitioner Nos. 1, 2 and 3 and the petitioner No. 4 were the joint licencees (hereinafter referred to as 'F.L. 5 licencees') for the retail vend of Indian-made foreign liquor shop situated at Cooperganj in the district of Kanpur Nagar. A provisional licence was issued to F.L. 5 licencees. They had also deposited a sum of Rs. 14,000 as security. Some dispute arose in respect of the location of the shop, which resulted in the shop being sealed by the excise authorities and subsequently, the licence was also cancelled by the Collector, Kanpur Nagar. The shop was reauctioned on 7.2.1977 for a sum of Rs. 4,000. The recovery proceeding was initiated for the short fall of Rs. 18,285, being the difference in the first and second auction, Against the recovery proceeding, the father of the petitioner Nos. 1, 2 and 3, Sri Lal Ram, filed a writ petition before this Court being Civil Misc. Writ Petition No. 4886 of 1979. Vide order dated 19.7.1979, this Court stayed the recovery of the amount in pursuance of the citation dated 29.5.1979 subject to the condition of furnishing a bank guarantee. According to the petitioners, the bank guarantee was furnished. The aforementioned writ petition had been dismissed for want of prosecution by this Court vide order dated 21.1.1998. It is alleged that an application for recall/restoration is pending in the said writ petition. After the dismissal of the writ petition, the bank guarantee has

been encashed by the respondent No. 1 on 3.2.1998. The Collector, Kanpur Nagar, had issued a recovery certificate on 29.7.1999 directing the Collector, Unnao, respondent No. 2, to recover a sum of Rs. 42,293 towards interest which is due from the father of the petitioner Nos. 1, 2 and 3 and the petitioner No. 4 as arrears of land revenue. The recovery certificate dated 29.7.1999 is under challenge in the present writ petition.'

3. We have heard Sri Mukesh Prasad, learned counsel for the petitioner and Sri S. P. Kesarwani, learned standing counsel for the respondents.

4. As the counter-affidavit and rejoinder affidavit have been exchanged between the parties, with the consent of the learned counsel, the writ petition is being heard and finally disposed of at the admission stage itself in accordance with the Rules of the Court.

5. Learned counsel for the petitioner submitted that F.L. 5 licencees were not defaulters as the shortfall pursuant to the reauction could not have been recovered as arrears of land revenue and, therefore, it was not an excise revenue which was payable by them. Thus, the question of levy of interest under Section 38A of the U. P. Excise Act (hereinafter referred to as 'the Act') does not arise. He further submitted that under Section 38A of the Act the interest is payable only if the excise revenue has not been paid within three months from the date it became payable and as in the present case after the dismissal of the writ petition on 21.1.1998, the bank guarantee had been encashed on 13.2.1998, no interest is payable. In support of his aforesaid submissions, he has relied upon the following decisions of this Court :

(i) Dhunmun Rant alias Badri Prasad v. State of U. P. and Ors., 1979 UPTC 1033 ; and

(ii) Ram Gopal v. State of U.P. and Ors., 1992 ALJ 237.

6. Sri S. P. Kesarwani, learned standing counsel, however, submitted that the bid was approved by the Excise Commissioner, U. P., Allahabad and there was a concluded contract between the parties. In this view of the matter, the submission

is that the shortfall towards the licence fee resulting from the reauction falls within the definition of the words 'excise revenue' and its non-payment or delayed payment attracts levy of interest under Section 38A of the Act. He further submitted that the grant of stay order by this Court in the earlier writ petition, would not stop the running of interest and the petitioners are liable to pay interest also. Thus, the recovery proceedings are fully justified. In support of the aforesaid pleas, he has relief upon the following decisions :

(1) Haji Lal Mohd. Biri Works, Allahabad v. State of U. P. and Ors., AIR 1973 SC 2226 ;

(2) Ram Chandra Ram, Contractor, country liquor shop, Raiganj, Ghazipur v. State of U. P. and Ors., 1974 UPTC 15 (FB);

(3) Sales Tax Officer, Sector-1, Kanpur and Anr. v. Dwarika Prasad Sho Karan Dass, 1977 UPTC 619 (SC) ;

(4) Maha Luxmi Sugar Mills Company v. Commissioner of Income-tax, Delhi, 1980 UPTC 689 ;

(5) Calcutta Jute Manufacturing Company v. Commercial Tax Officer and Ors., AIR 1997 SC 2920 ; and

(6) State of Haryana and Ors. v. Lal Chand and Ors., AIR 1984 SC 1326.

7. He further submitted that this Court while deciding the case of Ram Gopal (supra) has not considered the earlier decisions of the Supreme Court in the case of Haji Lal Mohd. Biri Works (supra) and the Full Bench decision of this Court in the case of Ram Chandra Ram, Contractor (supra) regarding interest where the stay order is operating and, therefore, the said decision does not lay down the correct law and in any case is not binding upon this Court being per incuriam.

8. Having heard the learned counsel for the parties, we find that in the case Dhunmun Ram (supra) this Court has held that the shortfall owing to default in payment of advance instalment is not an, excise revenue recoverable as arrears of land revenue. This Court has held that assuming that there was a concluded

contract between the parties and further assuming that the previous licence granted to the petitioner could not validly be terminated by them at their own will yet the damages accruing from the breach of contract could not validly be recovered as arrears of land revenue. They could be recovered through a civil suit.

9. In the case of Civil Misc. Writ Petition No. 682 of 1989. Radhey Shyam Jaiswal v. State of U. P. and Ors., decided on 17.1.1991, a Division Bench of this Court has taken a view that it is not open to a provisional licensee to walk out of the licence during the middle of the licensing year and if he does so, he owes full responsibility for paying balance amount of licence fee and in case of reauction, the shortfall in the auction money can be recovered as arrears of land revenue. The Court had considered its earlier decision in the case of Dhunmun Ram (supra) and had held that in view of Rule 368 which was introduced in 1984 with effect from 5.5.1984, the earlier Bench's decision in Dhummun Ram's case and other decision following the same are not applicable after the introduction of the said Rule in 1984. This Court had referred to its earlier decision in the case of Civil Misc. Writ Petition No. 943 of 1988, Hakim Singh v. State of U. P., disposed of on 7.12.1989 and Civil Misc. Writ Petition No. 843 of 1989, D. P. Singh v. State of U. P., disposed of on 17.4.1989. In the aforesaid case, this Court has distinguished the decision in Dhunmun Ram's case on the ground that there is an express provision in the licence issued that such loss can be recovered as arrears of land revenue. Condition No. 2 of the licence specifically provided that in case the licence is cancelled, the shop can be reaucted and if such reauction results in any loss to the State, it can be recovered from the licence as arrears of land revenue and the licence is bound by the conditions of the licence granted to him and at any rate he cannot be heard to say so in a writ petition. This Court has further held that both the means prescribed under Rule 373 (6) and the condition No. 2 of the licence are available to the State and it is left to the State to adopt either of them. The Court had not expressed any opinion on the question whether the amendment effected on 5.5.1984 avails the State and enables it to recover the said loss as arrears of land revenue as it had already interpreted Rule 373 (6) of the Rules as it stood during the relevant excise year 1976-77.

10. The aforesaid decision has been subsequently followed in the case of Smt. Saroj Devi, Saharanpur and Ors. v. Excise Commissioner, U. P., Allahabad and Ors., 1991 AWC (Suppl) 204 : 1991 UPTC 1242.

11. In the case of Lal Chand (supra), the Apex Court has considered the question as to whether the State Government was entitled to realize the difference which the respondent had agreed to pay under the terms of the licence of liquor vend and the amount realized on reauction of the vend and also the amount of defaulted instalment and the licence fee payable in respect of the liquor vend under the provisions of the Punjab Excise Act and the Punjab Liquor License Rules, 1956. The Apex Court has held as follows :

'16. Equally futile is the contention that the respondents had withdrawn their bid and therefore they could not be mulcted for the difference between the amount which they were liable to pay and the amount realized by re-sale of the vend.....

The second contention that the respondents had withdrawn their bid and were therefore not liable for the loss on reauction of liquor vend at Mandi Dabwali cannot be sustained.'

12. In this view of the matter, the plea that the shortfall was not an excise revenue, cannot be sustained.

13. The question is now only regarding liability of interest. Section 38A of the Act reads as under :

'38A. (1) Where any excise revenue has not been paid within three months from the date of which it becomes payable, interest at such rate not exceeding twenty four per cent per annum, as may be prescribed, shall be payable from the date such excise revenue becomes payable till the date of actual payment :

Provided that until a higher rate is prescribed, the rate of interest will be eighteen per cent per annum :

Provided further that in respect of an excise revenue which become payable before the commencement of the Uttar Pradesh Excise (Amendment) Act, 1985, interest at the said rate shall be payable from the date of such commencement if the excise revenue is not paid within three months of the said date.

Explanation.--Nothing in this sub-section shall be construed to affect the payment of interest under an agreement from the terms of an auction or, a decree of the Court, passed before the date of commencement of the Uttar Pradesh Excise (Amendment) Act, 1985 or which may be passed after the date of such commencement, in suits or proceedings filed before the said date.

(2) Provisions of Section 39 shall mutatis mutandis apply to realization of such interest as they apply to realization of excise revenue.'

14. From a reading of the aforesaid provisions it is clear that interest is payable where any excise revenue has not been paid within three months from the date of which it becomes payable. We have already held that the shortfall as a result of reauction which the petitioner was liable to pay is excise revenue.

15. In the case of Ram Gopal (supra) the facts were that Ram Gopal along with Hira Lal was granted licence by public auction for retail sale of the country liquor in respect of some shops in the district of Lalitpur for the excise year 1977-78. There was some dispute regarding curtailment of hours of the sale. He claimed compensation for the loss which he suffered due to illegal curtailing of selling hours of the country liquor. The writ petition was dismissed by this Court vide order dated 1st July, 1980 with certain observations. On the basis of the observation made by this Court, the petitioner therein applied for remission of the licence fee before the District Magistrate, Lalitpur. During the pendency of the application, recovery for a sum of Rs. 96,739.70 towards payment of balance amount of the licence fee was issued. The recovery certificate was challenged before this Court by means of Writ Petition No. 278 of 1980. Vide order dated 25th July, 1980 this Court stayed the recovery proceedings. The writ petition was ultimately dismissed on 16h December, 1986. During the pendency of the writ petition Section 38A was inserted by U. P. Act No. 7 of 1985 which came into force w.e.f. 29th March, 1985. After the dismissal of the writ petition the amount of licence fee was paid on

different dates and thereafter another recovery certificate was issued on 30th September, 1988 seeking recovery of interest of Rs. 47,556.70 which was due against the petitioner on the unpaid amount from 29th March, 1985. On these facts this Court has held that on the date the U. P. Excise (Amendment) Act commenced the excise revenue was not payable by the petitioner therein. It was certainly payable at an anterior point of time, but in between intervened the Court's interim order which created a situation that on the date U. P. Act No. 7 of 1985 commenced, no excise revenue was payable by the petitioner and, therefore, the petitioner is liable to pay interest only from 17th December, 1986 i.e. the next day after the petitioner's writ petition was dismissed till the date petitioner paid the licence fee.

16. In the case of Haji Lal Mohd. Biri Works (supra) the Apex Court has considered the question of levy of interest under the provisions of U. P. Sales Tax Act. Section 8 (1A) of the U. P. Sales Tax Act, which provides for interest, reads as follows :

'(1A) If the tax payable under Sub-section (1) remains unpaid for six months after the expiry of the time specified in the notice of assessment and demand, or the commencement of the Uttar Pradesh Bikri-Kar (Dwitiya Sanshodhan) Adhiniyam, 1963, whichever is later, then without prejudice to any other liability to penalty which the defaulter may, in consequence of such nonpayment, incur under this Act, simple interest at the rate of eighteen per cent per annum shall run on the amount then remaining due from the date of expiry of the time specified in the said notice, or from the commencement of the said Adhiniyam, as the case may be, and shall be added to the amount of tax and be deemed for all purposes to be part of the tax :

Provided that where as a result of appeal, revision or reference, or of any other order of a competent court or authority, the amount of tax is varied, the interest shall be recalculated accordingly :

Provided further that the interest on the excess amount of tax payable under an order of enhancement shall run from the date of such order if such excess remains unpaid for six months after the order.'

17. The Apex Court repelled the argument advanced before it that the interest on arrears of sales-tax could not be realised for the period during which the recovery of sales-tax was stayed. In paragraph 10 of the report the Apex Court has held as follows :

'10. Argument has also been advanced by Mr. Sen that the interest on arrears of sales tax could not be realised for the period during which the recovery of sales tax was stayed. We find it difficult to accede to this contention because there is nothing in the language of Section 8 (1A) of the Act which prevents the running of interest because of the operation of any stay order. Indeed, the liability to pay interest is created by the statute and the Sales Tax Officer has no discretion to grant any exemption from the payment of interest.'

18. In the case of Ram Chandra Ram Contractor (supra) the Full Bench of this Court has held that there is nothing in the language of Section 8 (1A) of the U. P. Sales Tax Act which prevented the running of interest because of the operation of any stay order. In paragraph 7 of the report the Full Bench has held as follows :

'7. In our opinion when the Supreme Court said that there was nothing in the language of Section 8 (1A) of the Act which prevented the running of interest because of the operation of any stay order, it meant to lay down that no order staying recovery of tax, passed either by the Government or any authority including the High Court, will prevent the running of interest. We have come to this conclusion because the Supreme Court has based its judgment on the interpretation of Section 8(1-A) and had held that it does not permit the stoppage of the accrual or running of interest. According to the judgment, interest accrues and continues to run automatically by force of law contained in Section 8 (1A) of the Act. This Court cannot, therefore, enter into the merits of the controversy to find out if the interest ran during the period of stay or not.'

19. In the case of Dwarika Prasad Sheo Karan Dass (supra) the Apex Court while following the decision of Haji Lal Mohd. Biri Works (supra) has held that liability to pay interest under Section 8 (1A) is automatic and arises by operation of law.

20. In the case of Maha Luxmi Sugar Mills Company (supra) the Apex Court has held that liability to pay interest is as certain as the liability to pay cess while interpreting the provisions of Section 3 (3) of the U. P. Sugarcane Cess Act, 1956. It has held as follows :

'11. Now the interest payable on an arrear of cess under Section 3 (3) is in reality part and parcel of the liability to pay cess. It is an accretion to the cess. The arrear of cess 'carries' interest ; if the cess is not paid within the prescribed period a larger sum will become payable as cess. The enlargement of the cess liability is automatic under Section 3 (3). No specific order is necessary in order that the obligation to pay interest should accrue. The liability to pay interest is as certain as the liability to pay cess. As soon as the prescribed date is crossed without payment of cess, interest begins to accrue.....'

21. In the case of Calcutta Jute Manufacturing Company (supra) the Apex Court has considered the provisions of Section 10A of the Bengal Finance (Sales Tax) Act 1941 which provided for payment of interest by a dealer. The Apex Court has held as follows :

'10. The state is empowered by the Legislature to raise revenue through the mode prescribed in the Act so that State should not be the sufferer on account of the delay caused by the tax payer in payment of the tax due. The provision for charging interest would have been introduced in order to compensate the State (or the Revenue) for the loss occasioned due to delay in payment the tax (vide Commr. of Income Tax, A. P. v. M. Chandra Sekhar, 1985 (1) SCC 283 : AIR 1985 SC 114 and Central Provinces Manganese Ore Co. Ltd. v. Commr. of Income Tax, 1986 (3) SCC 461 : AIR 1987 SC 438).'

22. In the case of Shree Chamundi Mopeds Ltd. v. Church of South India Trust Association, (1992) 3 SCC 1 the Apex Court has held that wherein operation of the order has been stayed by the Court it only means that such order would not be operative from the date of its passing. It would not mean that the order stayed had been wiped out from existence and the order of stay granted pending disposal of a case comes to an end with the dismissal of the substantive proceeding and it is the duty of the Court in such cases to put the parties in the same position they

would have been but for the interim orders of the Court.

23. In the case of Kanoria Chemicals and Industries Ltd. v. U.P.S.E.B., 1997 (3) AWC 1433 (SC) : (1997) 5 SCC 772, the Apex Court has held that grant of stay had not the effect of relieving the litigants of their obligation to pay late payment with interest on the amount withheld by them when the writ petition was dismissed ultimately. Holding otherwise would be against public policy and the interest of justice.

24. In the case of Kashyap Zip Industries v. Union of India, (1993) Supp (3) SCC 493, the Apex Court has awarded interest to the Revenue for the duration of stay under the Court's order, since the petitioners therein were found to have the benefit of keeping back the payment of duty under orders of the Court.

25. In the case of Style (Dress Land) v. Union Territory, Chandigarh and Anr., (1999) 7 SCC 89 the Apex Court has held that it is settled principle of law that as and when the party applies and obtains a stay from the Court of law, it is always at the risk and responsibility of the party applying for stay and mere passing of an order of stay cannot be presumed to be conferment of any additional right upon the litigating party. In the aforesaid case the Apex Court has considered the provisions of Section 3 of the Capital of Punjab (Development and Regulation) Act, 1952 which provided for fixation of consideration money of any transfer to the Central Government in such manner and at such rate of interest as may be prescribed. The Apex Court has upheld the awarding of interest at the rate of 15% per annum. It appears that this Court in the case of Ram Gopal (supra) had not considered the settled principles laid down by the Apex Court that staying the recovery of tax does not prevent the running of interest.

26. So far as the plea of per incuriam advanced by the learned standing counsel is concerned, we find that doctrine of per incuriam is applicable where by inadvertence a binding preceding or relevant provisions of the Statue have not been noticed by the Court.

27. In Halsbury's Laws of England (4th Edn.) Vol. 26 on pages 297-98 para 578 per incuriam has been stated as follows :

'A decision is given per incuriam when the Court has acted in ignorance of a previous decision of its own or of a Court of coordinate jurisdiction which covered the case before it, in which case it must decide which case to follow ; or when it has acted in ignorance of a House of Lords decision, in which case it must follow that decision ; or when ,the decision is given in ignorance of the terms of a statute or rule having statutory force. A decision should not be treated as given per incuriam, however, simply because of a deficiency of parties, or because the Court had not the benefit of the best argument, and, as a general rule, the only cases in which decision should be held to be given per incuriam are those given in ignorance of some inconsistent statute or binding authority. Even if a decision of the Court of Appeal has misinterpreted a previous decision of the House of Lords, the Court of Appeal must follow its previous decision and leave the House of Lords to rectify the mistake.'

28. In the case of *Mamleshwar Prasad v. Kanhaiya Lal*, (1975) 2 SCC 232, the Apex Court has held as follows :

'Certainty of law, consistency of rulings and comity of courts--All flowering from the same principle.--Converge to the conclusion that a decision once rendered must later bind like cases. We do not intend to detract from the rule that, in exceptional instances, where by obvious inadvertence or oversight a judgment falls to notice a plain statutory provision or obligatory authority running counter to the reasoning and result reaching, it may not have the sway of binding precedent. It should be a glaring case, an obstructive omission. No such situation presents itself here and we do not embark on the principle of judgment per incuriam.

Finally it remains to be noticed that a prior decision of this Court on identical facts and law binds the Court on the same points in a later case. Here we have a decision admittedly rendered on facts and law indistinguishably identical and that ruling must bind.'

29. In the case of *A.R. Antulay v. R. S. Nayak*, (1988) 2 SCC 602, the Apex Court has quoted the observations of Lord Goddard in *Moore v. Hewitt*, (1974) 2 All ER 270 (KBD) and *Penny v. Nicholas*, (1950) 2 All ER 89 (KBD) to the following effect :

' 'Per incuriam' are those decisions given in ignorance or forgetfulness of some inconsistent statutory provision or of some authority binding on the Court concerned, so that in such cases some part of the decision or some step in the reasoning on which it is based, is found, on that account to be demonstrably wrong.'

30. In the case of *State of U. P. v. Synthetics & Chemicals Ltd.*, (1991) 4 SCC 139, the Apex Court has observed as follows :

' 'Incura' literary means 'carelessness'. In practice per incuriam appears to mean per ignorantium. English Courts have developed this principle in relaxation of the rule of stare decisis. The 'quotable in law' is avoided and ignored if it is rendered, 'in ignorantium of a statute or other binding authority' *Young v. Bristol Aeroplane Co. Ltd.* (1944) 2 All ER 293.'

31. In the case of *Fuerst Day Lawson Ltd. v. Jindal Exports Ltd.* (2001) 6 SCC 356, the Apex Court has held that a prior decision of this Court on identical facts and law binds the Court on the same points of law in a latter case. This is not an exceptional case by inadvertence or oversight of any judgment or statutory provisions running counter to the reason and result reached. Unless it is a glaring case of obtrusive omission, it is not desirable to depend on the principle of judgment 'per incuriam'.

32. In the case of *Government of A. P. v. B. Satyanarayana Rao*, (2000) 4 SCC 462, the Apex Court held that the rule of per incuriam can be applied where a court omits to consider a binding precedent of the same court or the superior court rendered on the same issue or where a court omits to consider any statute while deciding that issue.

33. In the case of *State of Bihar v. Kalika Kuer alias Kalika Singh and Ors.*, 2003 (2) SCCD 953 : (2003) 5 SCC 448, the Apex Court has held that per incuriam would mean such element of rendering a decision in ignorance of any provision of the statute or the judicial authority of binding nature and earlier decision cannot be said to have been rendered per incuriam and liable to be ignored on the ground that a possible aspect of the matter was not considered or not raised before the

Court or more aspect should have been gone into by the Court deciding the matter earlier.

34. Thus it is well-settled by the decision of the Apex Court for the last more than 30 years that staying the recovery of tax does not prevent the running of interest. The decisions of the Apex Court in the case of Haji Lal Mohd. Biri Works (supra) and of the Full Bench of this Court in the case of Ram Chandra Ram Contractor (supra) have not been noticed by this Court in the case of Ram Gopal (supra) and the principles laid down in the case of Ram Gopal (supra) are in the teeth of the decision of the Apex Court and also of the Full Bench of this Court referred to above. The two provisions levying interest under Section 8 (1A) of the U. P. Sales Tax Act and Section 38A of the U. P. Excise Act are similar. Same principle shall be applicable in the cases falling under the U. P. Excise Act also. Thus it can safely be said that the decision in the case Ram Gopal (supra) is per incuriam and is not a binding precedent.

35. Applying the principle laid down by the Apex Court in the aforesaid cases, we find that the shortfall was in excise revenue, it became payable in the excise year 1976-77 itself, i.e., during the period when the licence was granted and cancelled, and, therefore, the interest under Section 38A of the Act was attracted.

36. In view of the foregoing discussions, we find no merit in this writ petition, which is hereby dismissed. However, there shall be no order as to costs.