HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPAOW No. 85/2012

Date of order: 27.11.2012

Kashmir Distilleries Private Ltd. v. State of J&K and ors.

Coram:

Hon'ble Mr. Justice M. M. Kumar, Chief Justice
Hon'ble Mr. Justice Mohammad Yaqoob Mir, Judge

Appearing counsel:

For the appellant(s) : Mr. D. S. Thakur, Sr. Advocate with
Mr. K. D. S. Kotwal, Advocate. .

For the respondent(s) :

i)	Whether to be reported in Press, Journal/Media	:	Yes
ii/	Whether to be reported in Digest/ Journal	:	Yes

M. M. Kumar, CJ

1. The instant appeal under Clause 12 of the Letters Patent is directed against judgment and order dated 16.11.2012 rendered by the learned Single Judge of this Court rejecting the claim made by the appellant-petitioner for refund of the amount on account of staff charges alongwith interest in terms of Section 24-B of the Jammu and Kashmir Excise Act Svt. 1958 (for brevity 'the Act'). The aforesaid amount was recovered by the respondent-State from the appellant-petitioner as staff charges.

2. The principal ground for rejecting the claim by the learned Single Judge is that the appellant-petitioner had earlier filed OWP no. 246 of 1999 with the prayer for quashing the notice of

demand and reminders issued by the respondent-department, asking the appellant-petitioner to pay the amount on account of staff charges of the excise staff posted at the distillery owned by the appellant. The appellant-petitioner had also prayed for issuance of a writ of Mandamus to the respondents not to operate the provisions of Rule 15, 16 and 17 of the J&K Distillery Rules, 1946 (for brevity 'the Rules'). The aforesaid writ petition was dismissed on 16.02.1999. Even the Letters Patent Appeal filed against the view taken by the learned Single Judge also failed. Accordingly, the judgment of the Division Bench has attained finality. The aforesaid adjudication thus binds the appellant-petitioner.

3. The Learned Single Judge has refused to entertain the petition by holding that once the matter stood settled by the Letters Patent Bench then a second petition on the same cause of action would not be competent. According to the learned Single Judge it would attract the principles of *res judicata*. The mere fact that the Supreme Court has subsequently declared Rule 17 of the Rules as illegal and unjust in the case of M/s Gupta Modern Breweries v. State of J&K and ors. [Appeal (Civil) 2700-2701 of 2000] on 19.04.2007 would not arm the appellant-petitioner with a fresh cause of action. The view of the

learned Single Judge is discernible from para 8 of the judgment which reads thus:-

> "Section 24-B of the Act of 1958, would not be attracted in the facts of this case, in as much as, by judicial process, the contention of the petitioner in the earlier round of litigation, that demand for payment is made illegally, has been turned down. Section 24-B of the Act of 1958 would come into play only in the case of a person where decision is taken either by the concerned authorities that the tax, fine or fee, has been recovered, though same was not recoverable under the Act of 1958 or when the Court of law would hold that the amount was not payable under the Act of 1958. In the case of the petitioner, as already stated, the Court of law had not accepted his claim of notice of payment being illegal. In the facts of this case, it cannot be said that the amount which was recovered from the petitioner was not payable under the Act of 1958. Rule 17 of the Rules of 1946 was declared to be illegal and unjust by the Hon'ble Supreme Court vide judgment handed down on 19.04.2007. Declaration of Act/provision of law or rule unconstitutional would take effect from the date of the judgment. The petitioner would not be entitled to seek benefit under the judgment of the Hon'ble Supreme Court in M/s. Gupta Modern Breweries versus State of J&K and ors, which was decided on 19.04.2007. In that case, the Hon'ble Supreme Court directed for refund of the payment made in the interregnum with interest calculated at the statutory rate as in terms of the interim order passed by the Hon'ble Supreme Court in that case, it was provided that "*in case the appeals are ultimately allowed, the respondents shall pay, on the refund ordered, interest at the statutory rate*". Since the Supreme Court had protected the rights of the appellant therein by the interim order, it, accordingly, directed for refund of the payment made during the pendency of the appeal. Section 24-B of the Act of 1958 came into play in that case because rule 17 of the Rules of 1946, under which the payment was recovered, was held to be illegal and it was the interim order of the Hon'ble Supreme Court coupled with section 24-B of the Act of 1958, which, by declaration of the rule 17 of the Rules of 1946 to be illegal, came into play in that case, the refund was ordered. In the case of the petitioner, the authority, under which the

> respondents charged and recovered staff charges from the petitioner, was not held to be illegal and, accordingly, section 24-B of the Act of 1958 is not attracted in the facts of the case of the petitioner."

4. The learned Single Judge has also found that there is no averment in the petition that the burden of tax has not been passed on to consumer or someone else. Thus on that score also the appellant-petitioner has been non-suited.

5. We have heard Mr. D. S. Thakur, learned senior counsel for the assessee. Mr. Thakur has argued that once there is change in law then the appellant-petitioner would be entitled to file a new petition and the principle of *res judicata* would not be attracted. According to the learned counsel Hon'ble the Supreme Court has repeatedly held that alteration in law would arm a litigant with a new cause of action. In support of his submission, learned senior counsel has placed reliance on the observations made by Hon'ble the Supreme Court in para 7 of the judgment rendered in the case of ***Mathura Prasad Bajoo Jaiswal and ors. v. Dossibai N.B. Jeejeebhoy, (1970) 1 SCC 613.*** According to the learned counsel where the law is altered after the earlier decision then the earlier decision would not operate as *res judicata* between the same parties because the matter in issue in a subsequent petition is not the same as in the previous proceedings.

6. We have thoughtfully considered the submissions made by the learned senior counsel and regret our inability to accept the same. It is elementary principle of law informed by public policy that once rights of partiers are settled then the same issues between the same parties are not raised over and over again. If that is to happen then an issue decided a number of years back would be re-opened on account of a judgment subsequently delivered which might take a contrary view. A nine-Judge Constitution Bench in the historic case of **I. R. Coelho v. State of T.N, (2007)2 SCC 1**, has decided highly significant question of law, namely, the constitutional validity of laws placed in Ninth Schedule can be judged on the touchstone of basic structure doctrine. The principles of direct impact and effect test i.e. rights test may also be applied. In other words the form of an amendment is not the relevant fact but the consequence thereof would be determinative factor. It proceeded to formulate the principles in para 151.

> "(i) A law that abrogates or abridges rights guaranteed by Part III of the Constitution may violate the basic structure doctrine or it may not. If former is the consequence of law, whether by amendment of any Article of Part III or by an insertion in the Ninth Schedule, such law will have to be invalidated in exercise of judicial review power of the Court. The validity or invalidity would be tested on the principles laid down in this judgment.
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> (ii) The majority judgment in Kesavananda Bharati's case read with Indira Gandhi's case, requires the

> validity of each new constitutional amendment to be judged on its own merits. The actual effect and impact of the law on the rights guaranteed under Part III has to be taken into account for determining whether or not it destroys basic structure. The impact test would determine the validity of the challenge.
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> (iii) All amendments to the Constitution made on or after 24th April, 1973 by which the Ninth Schedule is amended by inclusion of various laws therein shall have to be tested on the touchstone of the basic or essential features of the Constitution as reflected in Article 21 read with Article 14, Article 19, and the principles underlying them. To put it differently even though an Act is put in the Ninth Schedule by a constitutional amendment, its provisions would be open to attack on the ground that they destroy or damage the basic structure if the fundamental right or rights taken away or abrogated pertains or pertain to the basic structure.
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> (iv) Justification for conferring protection, not blanket protection, on the laws included in the Ninth Schedule by Constitutional Amendments shall be a matter of Constitutional adjudication by examining the nature and extent of infraction of a Fundamental Right by a statute, sought to be Constitutionally protected, and on the touchstone of the basic structure doctrine as reflected in Article 21 read with Article 14 and Article 19 by application of the "rights test" and the "essence of the right" test taking the synoptic view of the Articles in Part III as held in Indira Gandhi's case. Applying the above tests to the Ninth Schedule laws, if the infraction affects the basic structure then such a law(s) will not get the protection of the Ninth Schedule."

7. The formulations of their Lordship in sub-para (i) to (iv) of para 151 would show that epoch making principles have been laid down opening the doors of the Courts for the citizens to pierce the real face of legislation hiding behind the veil of 9th Schedule hither to that judgment. Even then the Nine-Judge Bench did not allow the settled issues to be reopened and in sub-para (v and vi) of para 151 went on to formulate the exception:-

> "(v) If the validity of any Ninth Schedule law has already been upheld by this Court, it would not be open to challenge such law again on the principles declared by this judgment. However, if a law held to be violative of any rights in Part III is subsequently incorporated in the Ninth Schedule after 24th April, 1973, such a violation/infraction shall be open to challenge on the ground that it destroys or damages the basic structure as indicated in Article 21 read with Article14, Article 19 and the principles underlying thereunder.
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> (vi) Action taken and transactions finalized as a result of the impugned Acts shall not be open to challenge."
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> (**Emphasis added**)

8. When we apply the aforesaid principles to the facts of the present case, it is conceded fact that the appellant-petitioner has earlier filed OWP no. 246 of 1999 which was dismissed on 16.02.1999 for the same relief emerging from the same cause of action. The judgment and order passed by the learned single Judge was duly tested by the appellant-petitioner before the Letters Patent Bench which also met the same fate. The only course open to the appellant-petitioner was to challenge the order of the Letters Patent Bench in further appeal to Hon'ble the Supreme Court. The appellant-petitioner could not have exercised options to file another writ petition claiming the same relief. In deciding the issue of such a nature it is not the concern of the Court whether the earlier decision was correct or not. The judgment in the case of Mathura Prasad Bajoo Jaiswal (supra) also does not support the cause of the appellant-petitioner and in fact lays down a contrary proposition supporting the view of

the learned Single Judge. Hon'ble the Supreme Court has proceeded to lay down the principles in the penultimate paras which would expose the hollowness of the contention raised on behalf of the appellant-petitioner and the same reads thus:-

> "11. It is true that in determining the application of the rule of res judicata the Court is not concerned with the correctness or otherwise of the earlier judgment. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent Court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier proceeding between the same parties may not, for the same reason, be questioned in a subsequent proceeding between the parties. But, where the decision is on a question of law, i.e., the interpretation of a statute, it will be res judicata in a subsequent proceeding between the same parties where the cause of action is the same, for the expression "the matter in issue" in Section 11, Code of Civil Procedure means the right litigated between the parties, i.e., the facts on which the right is claimed or denied and the law applicable to the determination of that issue. Where, however, the question is one purely of law and it relates to the jurisdiction of the Court or a decision of the Court sanctioning something which is illegal, by resort to the rule or res judicata a party affected by the decision will not be precluded from challenging the validity of that order under the rule of resjudicata, for a rule of procedure cannot supersede the law of the land."

9. A perusal of the aforesaid observations of the Supreme Court would show that if the matter in issue involves a pure question of fact and has been duly decided in an earlier proceeding by a competent court then in subsequent litigation between the same parties it would be regarded as finally decided and cannot be reopened. The answer would be the same in a case where mixed question of law and fact has been

determined in the earlier proceeding between the same parties. Where the decision is on a question of law involving interpretation of a statute, it would also be a res judicata between the same parties if the cause of action is same for the expression 'the matter in issue' in Section 11 CPC means the right litigated between the parties.

10. On principle and precedent it is thus established beyond any iota of doubt that any litigation which has attained finality cannot be re-opened merely because in a subsequent judgment a different view has been taken. Therefore, we are unable to accept the contention raised by learned counsel for the appellant-petitioner.

11. The appeal does not merit admission and the same is, accordingly, dismissed.

(Mohammad Yaqoob Mir) **(M. M. Kumar)**
Judge **Chief Justice**

JAAMU:
27.11.2012
Anil Raina, Secy.