(2008) 11 CAL CK 0019

Calcutta High Court

Case No: FMA No. 211 of 2008

CESC Limited		APPELLANT
	Vs	
West Bengal Pollution Control Board and Others		RESPONDENT

Date of Decision: Nov. 17, 2008

Acts Referred:

- Water (Prevention and Control of Pollution) Act, 1974 - Section 10, 11, 12, 13
- Water (Prevention and Control of Pollution) Cess Act, 1977 - Section 14, 14(1), 14(2), 3, 4

Citation: (2009) 1 CALLT 191

Hon'ble Judges: Surinder Singh Nijjar, J; Sanjib Banerjee, J

Bench: Division Bench

Advocate: Anindya Mitra, Avijit Chatterjee, L.K. Poddar and Gaurav Khaitan, for the Appellant; Kallol Basu and Talay Siddiqui, for the Respondent

Judgement

Sanjib Banerjee, J.

The appellant is aggrieved by the dismissal of its writ petition by which it had challenged two notices issued by the first respondent requiring the appellant to show-cause as to why criminal proceedings should not be launched against the officers of the appellant under the provisions of The Water (Prevention and Control of Pollution) Cess Act, 1977 (the said Act).

2. The appellant says that it would be evident from the affidavit used by the first respondent in the trial court that the notices of November 5, 1986 and November 11, 1986 were issued with ulterior motive as the first respondent had unhesitatingly acknowledged that the notices were issued to realise payment from the appellant. The appellant contends that the notices are without basis and inasmuch as subsequent to the issuance of the notices the first respondent''s principal demand on account of cess had been paid, the notices had lost all force and should have

been quashed as infructuous by the learned Single Judge. The appellant argues that the notices were inherently bad and could not have been issued at all.

3. The facts may be somewhat irrelevant in the context, but the bare essentials must be noticed to put the matter in perspective. The appellant uses water drawn from the river at two of its units in Mulajore and New Cossipore. The appellant says that at the time that the notices were issued, there was a genuine dispute as to whether the cess would be payable on the water drawn from a river by an industry without taking into account the water returned to the river after cleansing it at the post-use stage. The appellant submits that at the relevant time the appellant bona fide contended that the cess was payable only on the difference between the quantum of water drawn and the quantum of water returned to the source and that it had filed returns accordingly. It is urged that such a contention was not outlandish as other industries had taken the same stand and it required an order passed by the Supreme Court for the matter to be resolved that the water drawn by an industry would be the water consumed by the industry for the purpose of ascertaining the cess payable. It is an admitted position that notwithstanding Section 4 of the said Act requiring an industry or a local authority to affix a meter to measure the quantum of water drawn by the industrial unit, no meter was placed at either of the appellant''s units to assess the amount of water that the appellant drew. It is the common case that the Central Government has made no endeavour to place a meter at either of the appellant''s units. The assessment of water drawn is made on the foundation of a formula devised by the first respondent which is based on the diameter of the water-drawing pipe at an industrial unit. There is no apparent dispute between the parties on such score.

4. The appellant argues that if the appellant had harboured a bona fide belief that it was required to pay cess only on the quantum of water that was retained or wasted by it in course of use at its units, it could not be said that any return on water use or quantum of cess due made on such basis was false or known by the appellant to be false for it to suffer a threat of criminal proceedings against its officers under the said Act. According to the appellant, it was nearly a decade after the issuance of the show-cause notices that the question was answered by the Supreme Court pronouncement in the judgment reported at D.E.S.U. v. Central BD. for The Prevention and Control of Water Pollution . .

5. The appellant labours to establish that if it was the endeavour of the first respondent to extract payment by threatening criminal prosecution, the first respondent had achieved its purpose upon the appellant making payment of the principal amounts claimed. The appellant says that the first respondent had levied exorbitant interest on the principal sums claimed, which the appellant sought to question before the appropriate forum. The forum did not entertain the appellant''s plea merely on the ground that the challenge had been lodged beyond the permitted period and the forum did not have the power under the relevant statute

to condone the delay. The appellant informs that writ petitions have been filed before this Court from the orders refusing to entertain the appellant''s challenges to the demands on account of interest.

6. The first respondent submits that even if it is assumed that the first respondent went about issuing the notices to ensure that the money due was tendered, in the absence of the entire claim being satisfied, it cannot be said that the object of the show-cause notices has been achieved. The first respondent questions the appellant''s submission that all demands have been satisfied as, on the appellant''s showing, the interest due for the belated payments has not been paid.

7. The appellant suggests that even if its challenge to the two notices were found unacceptable, the appellant should have been afforded time by the learned Single Judge to use a reply. The appellant draws attention to the recording in the impugned order that such scaled down prayer had been made and argues that there was no basis for rejecting the innocuous plea. To start with, there was no obligation on the part of the first respondent to require the appellant to show cause as to why criminal proceedings against its officers should not be initiated. The notices record so. The notices speak of no stipulated procedure being laid down and spell out that to avoid any subsequent complication the notices were being issued to enable the appellant an opportunity to explain its position. This opportunity, as it appears, resulted in the writ petition being filed and an interim order obtained on February 9, 1987 restraining the respondents from filing any criminal complaint in respect of the matters covered by the notices. The interim order expired on April 1, 1987 but was revived by another order of June 2, 1987 which continued till August 1, 1987. It probably escaped the first respondent''s attention that the interim order stood vacated in 1987. The impugned order records that on August 28, 2003 an order was made to the following effect:
Interim order which is already passed will continue until further orders of this Court.

8. The impugned order also notices that as at August 28, 2003 there was no interim order in force on the writ petition.

9. Courts are loath to entertain challenges to show-cause notices unless the notice is demonstrably perverse or issued without jurisdiction. In all fairness, the appellant accepts that a challenge to a show-cause notice has to be made as in a demurrer and without questioning the contents thereof. The appellant refers to paragraph 9 of one of the show-cause notices and says that what had been said was that the returns filed by the appellant "appears to be false". The appellant says that this did not meet the exalted test required u/s 14(1) of the said Act. The appellant tends to gloss over the following sub-paragraph in paragraph 9 of the same notice where the first respondent sought to invoke Section 14(2) of the said Act. The said Act was introduced to provide for the levy and collection of a cess on water consumed by persons carrying on certain industries and by local authorities, with a view to

augment the resources of the central board and the state boards for the prevention and control of water pollution constituted under the Water (Prevention and Control of Pollution) Act, 1974. u/s 3 of the said Act a cess is levied on industry and local authorities defined under the said Act for utilisation of water. Section 5 requires an industry liable to pay cess under the said Act to file periodic returns before such authority as may be prescribed. Section 6 stipulates the manner in which cess has to be assessed and Section 8 provides for the cess collected u/s 3 to be credited to the Consolidated Fund for distribution of a part of the proceeds to the central and state pollution control boards to enable such boards to discharge their obligations under the Water (Prevention and Control of Pollution) Act, 1974. Section 10 recognises interest being payable on delayed payment of cess. Section 11 provides for penalty for non-payment of cess within the specified time and Section 12 specifies the mode for recovery of the amount due under the said Act. Section 13 allows a person or local authority aggrieved by an order of assessment or an order imposing penalty u/s 11 to prefer an appeal to the prescribed authority. Section 14 of the said Act, the one relevant for the present purpose, reads as follows:

14. (1) Whoever, being under an obligation to furnish a return under this Act, furnishes any return knowing, or having reason to believe, the same to be false shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

(2) Whoever, being liable to pay cess under this Act willfully or intentionally evades or attempts to evade the payment of such cess shall be punishable with imprisonment which may extend to six months or with fine which may extend to one thousand rupees or with both.

(3) No court shall take cognizance of an offence punishable under this section save on a complaint made by or under the authority of the Central Government.

10. The use of the expressions "appears to be false" and "attempting to evade payment" in the notices in the context of possible offences under Sections 14(1) and 14(2), respectively, of the said Act would not merit the quashing of the notices or the muffling of the likely criminal proceedings that may ensue. If anything, the first respondent had shown restraint in not having an altogether closed mind even while issuing the show-cause notices. The authority of the first respondent in issuing the notices in not questioned. The appellant also reveals that its returns were furnished on a premise that was subsequently held to be erroneous. In such circumstances, to entertain any challenge to the notices would amount to usurping the jurisdiction of the authority that may receive the complaints if the first respondent were minded to pursue the matter.

11. Ordinarily no writ lies against a charge-sheet or show-cause notice. Law journals abound with judgments on such score. The reason why a writ petition is not easily entertained against a show-cause notice or charge-sheet is that at that stage the

challenge may be premature. A mere charge-sheet or show-cause notice does not give rise to any cause of action as it does not amount to an adverse order affecting the rights of a party unless the same has been issued by a person having no jurisdiction to do so. It is eminently possible that after considering the reply to a show-cause notice or after holding an enquiry the authority concerned may drop the proceedings or hold that the charges are not established. A writ petition is generally entertained when some right of any party is infringed. A mere show-cause notice or charge-sheet may not infringe the right of any person. It is only when an order imposing some punishment or otherwise adversely affecting a party is passed, that such party can be said to have a grievance. The previous authorities and contemporaneous judicial thought in matters of such nature have been noticed in the judgment reported at (2006) 12 SCC 28 (Union of India v. Kunisetty Satyanarayana). Paragraphs 15 and 16 of the report are apposite:

15. Writ jurisdiction is discretionary jurisdiction and hence such discretion under Article 226 should not ordinarily be exercised by quashing a show-cause notice or charge-sheet.

16. No doubt, in some very rare and exceptional cases the High Court can quash a charge-sheet or show-cause notice if it is found to be wholly without jurisdiction or for some other reason if it is wholly illegal. However, ordinarily the High Court should not interfere in such a matter.

12. For the writ petitioner to then seek leave of court to issue a reply 20 years after receipt of the show-cause notices - when there was never any embargo on it to respond to them - was ironical and fittingly treated with disdain. There was no merit in the writ petition and there is even less in this appeal which is dismissed with costs.

13. Urgent certified photostat copies of this Judgment, if applied for, be supplied to the parties upon compliance with all requisite formalities. I agree.