SUPREME COURT OF INDIA

Harinagar Sugar Mills Ltd.

Vs.

State of Bihar

C.A.Nos.8274-8292 with 8293-8311 of 2001

(Brijesh Kumar and Arun Kumar, JJ.)

19.11.2003

JUDGEMENT

BRIJESH KUMAR, J.:-

1. The appellant, in the above noted Civil Appeals Nos. 8274-8292 of 2001 is a 'Company' registered under the Indian Companies Act, 1956 and has a sugar factory situate in Harinagar, District West Champaran in the State of Bihar. For the purposes of manufacture of sugar, the appellant had been purchasing sugarcane and the sugar produced would be sold as per provisions under the law. The molasses collected as one of the by-products was also sold by the appellant. By means of a Notification dated 21-7-1976 issued under Bihar Agricultural Produce Markets Act, 1960 (for short 'the Act'), Ram Nagar Agricultural Produce Market Area was constituted. A licence under the provisions of the Act was issued by the concerned Market Committee viz. the Bagha Agricultural Produce Marketing Committee to the appellant as a result of which the transactions of purchase of sugarcane and sale of sugar and molasses became subject to payment of market fee. The connected Civil Appeal Nos. 8293-8311 of 2001 have been filed by the Bagha Agricultural Produce Marketing Committee aggrieved by the part of the judgment of the High Court holding that they would not be entitled to recover the balance two-third amount of market fee which remained unpaid. For the sake of convenience in this judgment wherever we have referred "the appellant," it is

referred for the appellant in Civil Appeals Nos. 8274-8292 of 2001, namely Harinagar Sugar Mills Ltd.

2. The appellant filed a suit in the Court of the Subordinate Judge, Bettiah challenging the levy of market fee raising different grounds. By means of an interim injunction the Market Committee was restrained from realizing the market fee from the appellant. The suit was ultimately decreed in favour of the appellant in the year 1985. An appeal was preferred against the decree by the Market Committee, which was allowed on 28-8-1993 by the 2nd Additional District Judge. The second appeal preferred by the appellant was admitted and the judgment and order passed by the first appellate Court was stayed. The second appeal was disposed of in the year 1994 remanding the matter to the first appellate Court for consideration of the points which remained undisposed of. The appellant approached this Court by filing a Special Leave Petition in which leave was granted and it was numbered as Civil Appeal No. 1282 of 1995. However, in 1996 the learned single Judge dismissed the Second Appeal No. 516 of 1993 which was filed by the appellant in the High Court against which also a special leave petition was filed (S.L.P. (C) No. 9811 of 1996) in this Court.

3. During the pendency of the above matters before this Court, the Market Committee issued notices to the appellant for assessment for the years 1977-78 to 1995-96. The appellant was called upon to produce the relevant records before the Assessment Sub-Committee. In all 19 notices were issued for the period 1977-78 to 1995-96 for each year separately. This Court had also dismissed the S.L.P. (C) No. 9811 of 1996 in limine preferred against the judgment of the High Court dismissing the Second Appeal No. 516 of 1993. Ultimately market fee was assessed on the basis of best judgment assessment in respect of the 19 years, namely, from 1977-78 to 1995-96. Besides the market fee, penalty was also imposed to the tune of Rs. 1,85,51,658/-. The respondent, after making adjustment of the payments made, issued demand notices for depositing the market fee and the amount of penalty.

4. Feeling aggrieved by the order of assessment, the appellant filed 19 separate appeals for each year under S. 27-B of the Act before the Regional Director, Bihar Agricultural Produce Marketing Board. As per provisions contained under S. 27-B of the Act, the appellant deposited 1/3rd amount of the tax liability amounting to Rs. 1,84,06,973.20 ps. and the amount of penalty as well, as per requirement. By order dated 29-5-1998, the appellate authority dismissed all the appeals preferred by the appellant confirming the levy of market fee and penalty. The appellant filed revision-petitions before the Managing Director of the Bihar Agricultural Produce Marketing Board against the order dismissing the appeals. The revisional authority dismissed all the revisions preferred by the appellant by order dated 23-3-1999. The appellant thereafter preferred 19 writ petitions before the Patna High Court with a prayer for quashing of the assessment orders dated 16-5-1997. In the meantime, on 10-8-1999 Civil Appeal No. 1282 of 1995 filed by the appellant along with Civil Appeal No. 398 of 1977 filed by Belsund Sugar Company Ltd. was allowed by a Constitution Bench of this Court.

5. This Court, by means of the aforesaid judgment reported in AIR 1999 SC 3125, Belsund Sugar Company Ltd. v. State of Bihar, held that provisions of the Market Act do not apply to the transactions of purchase of sugarcane and sale of sugar and molasses by the Sugar Mills situate in the market area of the Market Committee. The judgment of this Court was however, made prospective 1999 AIR SCW 3074 paras 106 and 107 in application and the relevant part having bearing on the merits of the matter in hand may be perused which is quoted hereunder:

". . . . . .keeping in view the peculiar facts and circumstances of these cases, we deem it fit to direct in exercise of our powers under Art. 142 of the Constitution of India that the present decision will have only a prospective effect. Meaning thereby that after the pronouncement of this judgment all future transactions of purchase of sugarcane by the sugar factories concerned in the market areas, as well as the sale of manufactured sugar and molasses produced therefrom by utilizing this purchased sugarcane by these factories will not be subjected to the levy of market fee under S. 27 of the Market Act by the Market Committees concerned. All past transactions up to the date of this judgment, which have suffered the levy of market fee will not be covered by this judgment and the collected market fees on these past transactions prior to this judgment will not be required to be refunded to any of the sugar mills which might have paid these market fees.

107. However, one rider has to be added to this direction. If any of the Market Committees has been restrained from recovering market fee from the writ petitioners in the High Court or if any of the writ petitions in the High Court has, as an appellant before this Court, obtained stay of the payment of market fee then for the period during which such stay has operated and consequently market fee was not paid on the transactions covered by such stay orders there will remain no occasion for the Market Committee concerned to recover such market fee from the concerned sugar mill after the date of this judgment even for such past transactions. In other words, market fees paid in the past shall not be refunded. Similarly, market fees not collected in past also shall not be collected hereafter. The impugned judgments of the High Court in this group of sugar matters will stand set aside as aforesaid. The writ petition directly filed before this Court also will be required to be allowed in the aforesaid terms."

A perusal of the above judgment indicates that the judgment has been made prospective in effect and the market fee paid prior to the judgment in respect of past transactions was not liable to be refunded to the sugar mills. At the same time where market fee was not paid on past transactions in view of any stay order granted by the Court those dues would not be recoverable from the sugar mills. The petitioners, while filing appeals under S. 27-B of the Act, had deposited one-third of the market fee levied and the required amount of penalty with the Market Committee in view of provision of S. 27-B of the Act, which reads as under :

"27-B. Appeal.- (1) Any person dissatisfied with the order passed on assessment may appeal to the Regional Director of Agriculture Marketing of the area concerned.

(2) No appeal under sub-section (1) against the order of assessment under sub-section (7) or against the order of penalty passed under sub-section (8) of S. 27-A, or assessment under S. 27-AA shall be entertained unless the appellate authority is satisfied that the appellant has deposited with the Market Committee :

(a) In case of an appeal against the order of assessment and levy of market fee under sub-section (7) of S. 27-A or S. 27-AA one-third of the fee assessed as due against him or the admitted amount of fee whichever is higher.

(b) In case of an appeal against the order passed under sub-section (8) of S. 27-A, ten per cent. of the levy of penalty due from him."

6. The above noted provision requires the appellate authority to be satisfied that the deposit of one-third of the fee assessed as due, against the assessee and ten per cent. of penalty is also deposited by the assessee with the Market Committee failing which the appeal would not be entertainable at all.

7. At the time when the judgment was pronounced in Belsund Sugar Mill's case (supra) on 10-8-1999, the writ petitions preferred by the appellant impugning the assessment and imposition of fee and fine were pending in the High Court. The Division Bench disposed of all the 19 pending writ petitions saying that the matter had become academic only. However, in view of the observations made by this Court in paragraphs quoted above in Belsund Sugar Mill's case (supra), the appellant made a prayer before the High Court that the amount which they had deposited before filing of appeals may be ordered to be AIR 1999 SC 3125 : 1999 AIR SCW 3074 refunded to the appellant. The Market Committee on the other hand made a request that they may be allowed to recover the balance amount of the market fee which remained due against the appellant. The High Court refused the prayers of both the parties. It was held by the High Court that since the appellant had already deposited the amount of fee assessed on filing of the appeal, the said amount was not liable to be refunded in terms of the order passed in Belsund Sugar Mill's case (supra). As it concerns the refund of the amount of 10% of the penalty deposited by the appellant, the High Court observed that it was integral part of the fee as the same was imposed for default on the part of the petitioner in payment of the market fee. Therefore, it was also not liable to be refunded. It was also found that, according to the judgment of this court, the balance amount of the assessed fee was also not liable to be recovered by the Market Committee from the appellant. This is how both parties have filed appeals against the judgment of the High Court.

8. The main contention raised by Shri Shanti Bhushan, learned senior counsel appearing on behalf of the appellant, the sugar mills, is that one-third amount of the market fee as due, was deposited in compliance of the statutory provisions, according to which, it was a condition to be complied with before filing an appeal. Therefore, such a deposit cannot be taken to be payment of amount of market fee. It is submitted that there is no element of voluntary payment. Hence, it cannot amount

to "fee paid" which may absolve the liability of market fee as assessed and found due against the appellant.

9. The relevant provision for refund made in the judgment of this Court in the case of Belsund Sugar Mill's case (supra) is "..... the collected market fees on these past transactions prior to this judgment will not be required to be refunded to any of the sugar mills which might have paid these market fees." In the next paragraph again it is provided ".....In other words, market fees paid in past shall not be refunded.....". The question, therefore, which falls for consideration is as to whether the amount deposited with the market committee in view of the provisions of Section 27-B of the Act, before filing an appeal, would amount to 'amount of fee paid' by the appellant or not. In support of the contention that it would not be payment of the amount of fee assessed, reliance has placed on a decision reported in 1964 (7) SCR 579, J. Dalmia v. Commissioner of Income Tax, New Delhi, so as to indicate the meaning of the word 'paid'. It is in context with Section 16(2) of the Income-tax Act, 1922. The appellant before the Court held some shares in a company which had declared interim dividends in respect of which the appellant had also received a dividend warrant for a certain amount, as a shareholder in the company. The said amount of interim dividend was sought to be included in the income of the appellant in a particular assessment year. It was held that declaration of a dividend by a company may give rise to a debt it would not be enforceable as the Directors may rescind the resolution before actual payment of the dividend. It has been observed that dividend may be said to be paid within the meaning of Section 16(2) of the Income Tax Act, when the company discharges its liability and makes the amount unconditionally available to the member entitled thereto. On the basis of the above observation, it is submitted that the deposit made with the market committee in pursuance of the provisions contained under Section 27-B of the Act was not unconditionally available to the market committee. Nor it can be said that on such a deposit the liability of the appellant stood discharged to the extent of the payment made. The case referred to by the appellant noted above discussed and related to the provisions of the Income Tax Act. The interpretation was also made accordingly. In the case in hand, it was not merely a question of making an assessment and keeping the demand as due, on the other hand, one third of the amount of the fee assessed was actually deposited with the market committee, though, of course in pursuance of the provisions contained under Section 27-B of the Act. It is obvious that ultimately it would depend upon the result of the appeal as to whether the amount so deposited was liable to be retained by the market committee or the same was liable to be refunded in the event appeal succeeded. It can thus be said that at the time of the deposit of the amount in pursuance of the requirement of Section 27-B of the Act the amount was actually paid AIR 1999 SC 3125 : 1999 AIR SCW 3074, AIR 1964 SC 1866, AIR 1988 SC 1263 : 1988 Tax LR 1095, AIR 1998 SC 3050 : 1998 AIR SCW 2910 but it would be subject to result of appeal. Thus the crucial stage which would be relevant is the stage of decision of the appeal. Yet another case relied upon so as to ascertain the meaning of the word 'paid' is reported in 1988(3) SCC page 553, Commissioner of Income Tax, U.P.-II Lucknow v. Bazpur Co-operative Sugar Factory Ltd., Bazpur, Distt. Nainital. The question for consideration in the above noted case was as to whether the deductions made from the amount payable to its members on account of supply of sugarcane could be included in taxable income or not. It was held that it is immaterial as to under what head the deposits are entered, on the other hand what would be material is the purpose for which they are to be utilized. The deductions were for the "Loss Equalisation and Capital Redemption Reserve Fund". But it was first liable to be used in adjusting the losses of the society and thereafter for payment of initial loan from Industrial Finance Corporation and then for redeeming the government share and only in the event of balance being left it was liable to be converted into share capital. So the primary purpose was to discharge the

liability of the society. Hence they were liable to be included in the taxable income as amount paid. We don't think that the said decision helps the appellant in any manner. Similarly, a decision referred to in the case of State of M.P. and Ors v. Indore Iron and Steel Mills Pvt. Ltd. (1998)6 SCC 416 also has no application to the question involved in the present case. The next case referred to is reported in 1993 (66) E. L. T. 557 (Cal), Super Cassettes Industries Ltd. v. Collector of Customs. In this case as a pre-condition for filing an appeal the petitioner had made deposit of disputed amount as per requirement of Section 129E of the Customs Act, 1962. The appeal was allowed. The petitioner in that case applied for refund of the amount deposited as a pre-condition of filing an appeal. The same was not refunded and an argument seems to have been raised that it was amount of duty deposited by the petitioner hence, not liable to be refunded. The High Court repelled the argument and held as follows :

"Such deposit should not be treated as payment of duty. The Section itself speaks of the payment as "deposit with proper officer". Therefore, provisions of Section 27 cannot stand in the way of refund of deposit made by the petitioner for preferring an appeal to CEGAT. Section 27 applies only to the case of persons who are claiming refund of any duty paid in pursuance to an order of assessment or any duty borne by that person. But when an amount equivalent to duty is deposited with 'proper officer' for the purpose of preferring an appeal, such deposit cannot be treated as duty paid by the petitioner in pursuance to an assessment order. The amount deposited remained merely as deposit till the disposal of the appeal by the tribunal. Now the petitioner has succeeded in the appeal. The petitioner is entitled to obtain refund of the amount deposited."

(Emphasis supplied)

It is to be noted that the deposit made as a pre-condition of filing an appeal has been though held cannot be treated as duty paid by the petitioner in pursuance of the assessment order and it was held that it remained as a deposit till the disposal of the appeal. Since the appellant has succeeded in the appeal the amount was liable to be refunded. Therefore, what has been held is that during the pendency of the appeal such a deposit equivalent to the duty remains only a deposit and not the duty paid. But as it is evident the character of the deposit would change on decision of the appeal. Another case relied upon on behalf of the appellant is reported in 1996(82) E.L.T.177 (Bom), Suvidhe Ltd. v. Union of India. In this case also it has been held that deposit made as a pre-condition to avail of the right of appeal is not payment of duty but it is only a deposit and on the appeal being allowed the same was liable to be refunded. In this case also it is to be noted that the result of the appeal has an important bearing on the nature of the deposit. 1999 (112) E. L. T. (Del), Voltas Limited v. Union of India, has also been relied upon. In this case also deposit was made in terms of Section 35F of the Central Excise Act, 1944 while filing an appeal. The order under appeal was set aside and while allowing the appeal the case was remanded. It was held that in such circumstances there was no reason to retain the deposit which was liable to be refunded. It was observed that once the order was not found to be 1999 (112) ELT 34 satisfactory and set aside, a fresh decision on the matter was awaited after adjudication. There was no such provision providing for deposit during pendency of adjudication in absence of any order assessing liability, the one which was appealed against ceased to exist on being set aside in appeal. According to the relevant provision it was deposit pending appeal. It is thus observed in the judgment as follows.

".....It is clear that the amount so deposited remains a deposit pending appeal and is thereafter available for appropriation or disbursal consistently with the final order maintaining or setting aside the order of adjudication."

All the above noted cases of different High Courts are those where the order fixing the liability has been set aside and the appeal had been allowed. No case has been cited wherein it may have been held that even though the appeal is dismissed the amount so deposited would not be treated as a deposit towards the tax liability.

10. On the other hand, Shri S. B. Sanyal, learned senior counsel appearing for the market committee in these appeals submits that the amount deposited in view of Section 27-B of the Act before filing an appeal is nothing else but the amount of market fee as assessed and due against the assessee which is paid. Once it is a payment of part of the fee, paid before the judgment of this court in the Belsund Sugar Mill's case (supra) it is not liable to be refunded. It has also been submitted that the amount so deposited is not from the coffers of the petitioner mill but the amount which was realized by them from other parties to be passed on to the market committee. He has further indicated that the revisional Court in its order while dismissing the revisions, directed the committee to take steps to realize the balance amount of market fee and the penalty from the appellant. On this basis it is submitted that the amount already deposited, namely, one third of the amount due on account of fee while filing an appeal was treated as an amount of fee and by itself liability of the petitioner to that extent was discharged. He has also drawn our attention to some of the observations made by the appellate authority to show that amount deposited was treated to have been "paid". In support of his contention that the amount was not liable to be refunded, he has drawn our attention to the provisions of the Customs Act and the Central Excise Act that the amount deposited is amount relating to demand. Section 129E of the Customs Act mentions deposit of the amount pending appeal, out of the demand or penalty levied. He has also referred to Section 35F of the Central Excise Act to strengthen the argument. We, however, do not deem it necessary to refer to the provisions under the other Act, and may peruse the provisions as contained under the Bihar Agricultural Produce Markets Act. It has also been submitted on behalf of the respondents that on dismissal of the appeal there was no occasion to ask for the refund of the amount paid out of the liability assessed and due. The revision preferred against the order of dismissal of appeal was already dismissed and the pendency of the writ petitions against the orders passed in revision would be of no relevance as writ proceedings are not continuation of the suit or appeal. In support of his contention, he has referred to certain decisions. In 1992 Supp (2) SCC 312, H. B. Gandhi, Excise and Taxation Officer-cum-Assessing Authority, Karnal and Ors. v. M/s Gopinath and Sons and Ors. It has been held that judicial review under Article 226 of the Constitution is not directed against the decision but is confined to decision making process. In exercise of writ jurisdiction re-appraisal of evidence or the correctness of the decision is not to be gone into. It is not to be treated as an appeal against the orders impugned. (1992)1 SCC 380, Chandigarh Administration and Ors. v. Manpreet Singh and Ors. has been referred to for the proposition that the High Court cannot assume the appellate jurisdiction while exercising power under Article 226. 1995 Supp (2) SCC 535, State of U.P. and Ors. v. Committee of Management of S. K. M. Inter College and Ors, has also been referred to for the same proposition that proceedings under Article 226 of the Constitution are not

like appellate proceedings. On the basis of the above decisions the contention is that the decision of the statutory authorities on facts had attained finality and the pendency of writ petition cannot be said to be continuation of those proceedings. Hence AIR 1999 SC 3125 : 1999 AIR SCW 3074, AIR 1992 SC 435 : 1992 AIR SCW 28, 1995 AIR SCW 3030 what-ever amount had been deposited as against the fee due would only be payment towards the discharge of the liability. Our attention has also been drawn by the learned counsel to some other details regarding the manner in which the demand of the balance amount has been made and to the fact as to whether the appellants had realized the amount from others to be passed on to the appellant and that the amount deposited with market committees had been spent by them. We think these points will not materially affect the merits of the matter nor we propose to enter into those areas of factual disputes.

11. The main question, however, that needs to be considered is whether the amount deposited in view of Section 27-B of the Act is deposit of the liability of dues of fee assessed or not.

12. The amount in respect of which the appellate authority is to be satisfied that it has ben so deposited, according to Section 27-B of the Act has to be in certain proportion of the amount of fee assessed and due. That is to say the liability of the assessee is already fixed and the amount assessed is treated to be amount due to be paid, it is an ascertained amount out of dues which must be paid to the committee. Therefore, there can hardly be any doubt about the fact that it is a part of the amount out of the total liability outstanding against the appellant which appellant is required to pay to the party viz. the market committee before filing an appeal. It is not a deposit in Court or with appellate authority. Merely because liability in certain proportion is ensured to be in deposit before filing of an appeal, does not change the character of the deposit of a part of dues which is also specifically described to be fee assessed as due. It is not provided that the deposit is by way of security which would generally not be required to be paid to the party. Such deposits like security deposits are of different kind which are sometimes found provided for without reference to any monetary liability involved in the case, e.g. in election petition or other proceedings where some amount of security may be required to be deposited. In the present case, there is no scope to treat the amount deposited as anything else except part of the fee assessed and due. It is to be noted that the provision under Section 27-B of the Act is that the appellate authority is to be satisfied that the appellant has deposited with the market committee one third of the fee assessed before he files an appeal. It is quite obvious that in case the appeal fails what would be required to be deposited would only be the balance of the amount of the liability, if that too is not already paid. In case the appeal succeeds, the amount paid against assessed liability which is later set aside cannot be retained and in the normal course, it is liable to be refunded, unless of course for some good reasons, it is ordered otherwise. For Example, where it may amount to undue enrichment of the appellant. In the case of the appeal being unsuccessful, in the normal course, nothing more would be required to be done to the extent of deposit made. Therefore, merely, because the amount deposited may have to be refunded in case appeal succeeds that alone does not mean that the nature of the deposit is changed or it is anything else except the amount of levy assessed and due, particularly looking to the language used and provision made under Section 27-B of the Act, where the appellate authority has only to be satisfied about the payment made to the committee. Some observations relating to deposit of the tax liability while filing an appeal, though in a slightly different context, throw some light as to the nature of the deposit. In the Anant Mills Co. Ltd. and Ors. etc. etc. v. State of Gujarat and Ors. etc. etc. (1975)2 SCC 175 at page 202,, this court observed: AIR 1975 SC 1234 at p. 1249, para 40

"..... In the absence of any special reasons there appears to be no legal or constitutional impediment to the imposition of such conditions. It is permissible, for example, to prescribe a condition in criminal cases that unless a convicted person is released on bail, he must surrender to custody before his appeal against the sentence of imprisonment would be entertained. Likewise, it is permissible to enact a law that no appeal shall lie against an order relating to an assessment of tax unless the tax had been paid. Such a provision was on the statute book in Section 30 of the Indian Income-tax Act, 1922. The proviso to that section provided that "..... no appeal shall lie against an order under sub-sec. (1) of Section 46 unless the tax had been paid". Such conditions merely regulate the exercise of the right of appeal so that the same is not abused by a recalcitrant party and there is no difficulty in the enforcement of the order appealed against in case the appeal is ultimately dismissed. It is open to the Legislature to impose an accompanying liability upon a party upon whom legal right is conferred or to prescribe conditions for the exercise of the right. Any requirement for the discharge of that liability of the fulfilment of that condition in case the party concerned seeks to avail of the said right is a valid piece of legislation, and we can discern no contravention of Article 14 in it."

(Emphasis supplied by us)

It appears that imposition of a pre-condition of deposit of the liability before filing an appeal was challenged but it it clearly held that a party while availing of a right to appeal conferred under a statute can be required to discharge the tax liability. Such a deposit made is described as discharge of liability. Such a condition imposed, would not change the nature of the amount paid or deposited out of the amount as assessed and found due. No doubt it is true that order assessing the liability remains under challenge but such a deposit made discharges the liability of the payment of the amount assessed and found due, to the extent of deposit made, subject indeed to the decision of the appeal.

13. We have already noticed that in all the cases cited by the learned senior counsel Shri Shanti Bhushan on behalf of the appellant the appeals were allowed and the amount was held to be refundable. Even in one of the cases, Voltas case (supra), where after setting aside the order of assessment the matter was remanded, it was held that there was no good reason or any order against which the amount deposited as a pre-condition to file an appeal, could be retained. Fresh order was awaited. But where amount of liability has been assessed and fixed and the order exists, pre-appeal deposit will be nothing else but payment of the liability assessed and discharged to the extent of the amount of liability paid, subject to the result of the appeal. We are not concerned with other kind of cases where there may be different reasons for deposit of security or any amount of any other nature. Mere filing of the appeal does not absolve the appellant nor suspends the liability assessed during pendency of the appeal. It continues unless paid or set aside. Any payment made during that period when liability subsists shall be in discharge of that liability as fixed. As provided under Section 27-B of the Act the appellate authority has only to be satisfied that a given part of the fee assessed and due has been paid to the committee before it entertains the appeal. There is no

direction as such for the appellant to make any payment, under Section 27-B of the Act. It is for the appellate authority to be satisfied that a part of the liability is in deposit with the committee.

14. Considering the facts of the present case in the light of what has been observed by us above, we find that orders of assessment had been made. The liability had been fixed and the amount was determined. The appellate authority was satisfied that one third amount of the fee assessed and due was paid to the committee before filing of appeals. The appeals were dismissed. The revisions preferred thereafter were also dismissed. All statutory remedies stood exhausted. Writ petitions filed under Article 226 of the Constitution were pending when the order of this Court was rendered in the case of Belsund Sugar Mills case (supra). The writ petitions were disposed of in the light of the judgment of this Court without interfering with the orders of assessment and the appellate and the revisional orders. In the case of Belsund sugar Mills (supra) specific directions have been issued in exercise of powers under Article 142 of the constitution as to in what circumstances the amount paid is to be refunded and not to be refunded. We have already quoted earlier the relevant part of the judgment in the Belsund Sugar Mills case (supra) according to which the judgment was prospective in effect without affecting the past transactions and the orders, but the amount of the liability of the fee which had already been paid till the date of the order was not to be refunded but the balance which remained unpaid was also not to be recovered. In this case we have already held that the amount deposited before filing of appeals was a part of the liability assessed and found due and partly in discharge thereof. It was, therefore, not liable to be refunded and the High Court has rightly held so. AIR 1999 SC 3125 : 1999 AIR SCW 3074

15. Similarly, we find no force in the appeal preferred by the market committees for a direction to the assessees to deposit the balance amount of the fee assessed. It AIR 1999 SC 3125 : 1999 AIR SCW 3074 cannot be done in view of the judgment of this Court in the case of Belsund Sugar Mills case (supra).

16. Learned counsel for the appellant has submitted that once it has been found by this court in the case of Belsund Sugar Mills (supra) that market fee would not be liable to be paid by the sugar mills, there is no occasion to impose or realize or retain the amount of penalty collected/deposited on account of delayed payment of the market fee. It is submitted that as a normal consequence of the judgment in the Belsund sugar Mill's case (supra), there would be no liability to pay the market fee even though covered by past transactions and orders or in future. But in exercise of power under Article 142 of the Constitution of India, this Court provided that the judgment shall have prospective application and the past transactions and assessments prior to the date of the judgment shall not be affected, but further provided that the amount already paid before the date of the judgment shall not be required to be refunded to the sugar mills and the amount which remained unpaid in view of any order of stay granted by the Court, shall not be liable to be recovered. Subject to above arrangement, normally, no amount of fee would have been liable to be paid. That being the position, the question of penalty on delayed payment does not arise, more particularly, when there is no provision made in the order that the amount of penalty already paid shall also not be refunded. It is further submitted that apart from the one third amount of fee which has been deposited while filing the appeal, the rest of the amount has been held to be not recoverable by the High Court. That

is to say, two third of the market fee assessed, realization of which was stayed, is not liable to be paid or recovered. But the penalty has been imposed considering the whole amount of fee assessed, even the amount which is not recoverable in pursuance of the judgment passed in Belsund Sugar Mill's case (supra). It would be completely an anomalous situation that the balance unpaid amount of two third would not be liable to be paid or recovered but 10% of penalty on that amount which has been deposited, while filing the appeal would not be refunded. The High Court has brushed aside this claim of the appellant merely by observing that penalty is an integral part of the tax liability. We, therefore, find that the amount which was in fact not liable to be paid but a part of it is being retained in pursuance of the arrangement made in exercise of powers under Article 142 of the Constitution of India and the remaining part which is not recoverable, no penalty is liable to be recovered and retained. In our view, that the 10% amount of the penalty as paid by the appellant is liable to be refunded. AIR 1999 SC 3125 : 1999 AIR SCW 3074

17. Learned counsel for the appellant made a submission that in case the question of refund of market fee deposited is not favourably considered, in that event, the matter may be remanded to the High Court so that the appellant may argue the matter before the High Court on the merits challenging the orders of assessment and on the question as to whether there was or not any quid pro quo against the amount paid by the appellant. We do not think it is possible to accede to the request made. The whole matter was before the High Court. It was always open to the appellant to have argued any point it wished to argue while matter was under hearing. Once having not done so, the matter cannot be remanded to be opened afresh on disputed questions.

18. In the result, the appeals, i.e. Civil Appeal Nos. 8274-8292 of 2001, filed by the Sugar Mills are dismissed but with a modification to the extent that the respondents shall refund the amount of penalty which has been paid by the appellants, namely 10% amount of penalty, within a period of four months from the date of communication of this judgment. The appeals, i.e. Civil Appeal Nos. 8293-8311 of 2001, filed by the Market Committees for recovery of the balance of two third amount from the sugar mills, are also dismissed.

19. The parties to bear their own costs.

Order accordingly.