

(2014) 02 AP CK 0013

In the Andhra Pradesh High Court

Case No : Company Application No. 641 of 2012 in Company Appeal No. 22 of 2009

B. Subba Reddy

APPELLANT

Vs

V.N. Sunanda Reddy and Others

RESPONDENT

Date of Decision : 14-02-2014

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 41 Rule 4, Order 47 Rule 1 11
Companies Act, 1956 — Section 397 398
Income Tax Act, 1961 — Section 254

Citation : (2014) 02 AP CK 0013

Hon'ble Judges : Vilas V. Afzulpurkar, J

Bench : Single Bench

Advocate : Y. Ratnakar, for the Appellant; S. Ravi for Mr. Vikram Pooserla, for the Respondent

Final Decision : Dismissed

Judgement

Vilas V. Afzulpurkar, J.—This review application is filed seeking review of the judgment of this Court dated 22.02.2012 in CA. No. 22 of 2009. The aforesaid company appeal arises out of CP. No. 14 of 2007 on the file of the Company Law Board (CLB), Additional Principal Bench, Chennai. The petitioner herein figured as the second respondent in the company petition.

2. M/s. S.S. Organics Limited (referred to as company) lost its net worth and became a sick industrial company and approached the Board for Industrial and Financial Reconstruction (BIFR). Under a revival scheme of 2002, revival of the company was envisaged and under that scheme certain outstanding unsecured loans were converted into equity shares. However, as that scheme could not be achieved, a modified scheme 2005 was envisaged whereunder the unsecured loan of Rs. 2,50,00,000/- was converted into equity shares, as per the orders of BIFR. The review petitioner questioned the said order of BIFR before Appellate Authority for Industrial and Financial Reconstruction (AAIFR) in Appeal No. 48 of

2004, which was, however, dismissed. The review petitioner questioned the said orders in WP. No. 350 of 2006 before this Court, which was also dismissed on 06.11.2011. It appears that, thereafter, the review petitioner filed two civil suits questioning the allotment of share and composition of the Board of Directors, but the suits were returned/rejected.

3. Consequently, the review petitioner filed CP. No. 22 of 2005 questioning the allotment of 20,00,000 shares in pursuance of the sanctioned scheme 2002. Pending the said company petition, the company convened its 12th Annual General Meeting and as per interim orders in the company petition, an observer was appointed in whose presence the said meeting was held on 29.09.2005. Thereafter, the company convened its 13th Annual General Meeting under notice dated 15.09.2006 to be held on 20.10.2006 at 4 PM. The review petitioner, however, disputes holding of such meeting and claimed that he and his associates conducted the 13th Annual General Meeting on the same day at 4.30 PM and passed certain resolutions including electing of new Directors in the place of existing Directors, some of the contesting respondents herein. In the meeting conducted by the review petitioner and his associates, 25,00,000 shares allotted in favour of the first respondent herein were, allegedly, cancelled. Questioning the said cancellation, the first respondent herein filed CP. No. 14 of 2007 u/s 397 and 398 of the Companies Act, 1956 to declare the alleged 13th Annual General Meeting, said to have been conducted by the review petitioner, as invalid and consequently, restrain them from giving effect to the resolutions, allegedly, passed in the said meeting. By order dated 14.08.2009, the CLB disposed of the said company petition with certain directions and aggrieved thereby, the review petitioner filed CA. No. 22 of 2009 and the fifth respondent herein also filed another appeal, being CA. No. 24 of 2009. Both the said appeals were heard and disposed of by a common judgment of the learned company Judge on 22.02.2012 whereby both the appeals were dismissed confirming the order of the CLB.

4. As stated above, the present review petition is filed so far as CA. No. 22 of 2009 is concerned.

5. Mr. Y. Ratnakar, learned counsel for the review petitioner, has raised several contentions, which, according to him, satisfy the criteria, as per Order XLVII Rule 1 of the Code of Civil Procedure, 1908 and that there are errors apparent on the face of the record warranting review of the judgment. The contentions of the learned counsel are based upon the decision of the Supreme Court in Honda Sael Power Products Ltd. Vs. Commissioner of Income Tax, wherein it was held that the Income Tax Appellate Tribunal has powers to rectify the mistakes on record. Learned counsel placed reliance upon a decision of the Delhi High Court in Surinder Singh Vs. Sohan Singh, and a decision of the Bombay High Court in Smt. Shakuntalabai Krishna Bhoir and Others Vs. State of Maharashtra, and contended that the learned company Judge failed to frame relevant points for consideration and has omitted to consider the evidence on record and the

violation of various provisions of the Companies Act by the respondents in allotment of shares. Several other contentions are also raised to contend that the first respondent, who approached the CLB, had not approached this Court with clean hands and is guilty of suppression of material information apart from contending that the findings of the learned company Judge under the judgment under review are not sustainable in law.

6. Mr. S. Ravi, learned senior counsel for the first respondent, on the other hand, points out that no ground with regard to unclean hands or suppression of any fact is raised against the first respondent, as could be seen from the grounds of appeal. Learned senior counsel also points out that points for consideration were, in fact, framed by the learned company Judge and answered accordingly by considering the contentions and the material on record. Hence, no review on any ground is permissible.

7. It is well settled that jurisdiction to review a judgment is not to be enlarged into rehearing of the matter afresh. An application for review, therefore, must fall within one of the ingredients under Order XLVII Rule 1 CPC. The decision of the Supreme Court in *Honda Sael Power Products Ltd.*'s case (1 supra) relied upon by the learned counsel for the review petitioner is distinguishable inasmuch as in that case, the Supreme Court was considering the power of tribunal u/s 254 of the Income Tax Act, which specifically provides for power to rectify the mistakes on record. The review jurisdiction under Order XLVII Rule 1 CPC is, however, restricted.

8. Apart from the above questions raised, in my view, there is a fundamental defect with respect to the maintainability of the review petition. As already mentioned above, the judgment of the learned company Judge is a composite and common judgment in two appeals dealing with the same subject matter of the dispute. The present review petition is filed only in one of the appeals. Admittedly, no review petition was filed in the other appeal, which forms part of another judgment. The judgment under review, so far as the other appeal is concerned, had, therefore, attained finality. It also cannot be disputed that the judgment under review cannot be bisected into separate judgments concerning two separate appeals, as the company petition, out of which these appeals were filed, is one and the facts as well as the findings are common. Hence, in such a situation any exercise of jurisdiction by reviewing the judgment in one of the appeals would lead to two conflicting judgments, which is impermissible. In this context, the decision of the Supreme Court in *Premier Tyres Limited Vs. Kerala State Road Transport Corporation*, directly applies in the present fact situation. As has been held in the aforesaid decision, the present review petition in one of the appeals cannot be entertained as it is affected by principle of *res judicata*. The aforesaid proposition of law is well settled by the decision of the Supreme Court in *Ram Prakash Vs. Smt. Charan Kaur and Another*, also.

9. Since this aspect was not argued by both the learned counsel earlier, this matter was listed under the caption "for being mentioned" and both the learned

counsel were heard on this question.

10. Mr. Y. Ratnakar, learned counsel, contends that omission to challenge the judgment in other appeal out of common judgment would not affect the review petition, as, according to him, Section 11 CPC would not apply, as the parties (appellant) in both the appeals are different. Learned counsel, therefore, submits that the decision in Premier Tyres Limited's case (4 supra) would not be applicable as that deals with two different suits of two different parties and also the decision in SHRI RAM PRAKASH's case (5 supra) wherein two cross-suits for damages were filed by both parties against each other, would not be applicable to the present case. Learned counsel submits that Order XLI Rule 4 CPC permits the review petitioner to challenge the judgment by way of a review in one of the appeals under common judgment.

11. I am unable to accept any of the said contentions, as the company appeals came up before the learned company Judge out of the same company petition and the same impugned order, but by different respondents. Both the appellants are parties in both the appeals and all other parties in the company petition are also parties in both the appeal. Undisputedly, the subject matter and the points involved are common and hence, both the appeals were disposed of by a common judgment. The principles of res judicata, therefore, clearly apply, as the judgment in the other appeal, CA. No. 24 of 2009, binds the review petitioner herein also. For appreciating the principle, relevant paras of the decision of the Supreme Court in Premier Tyres Limited's case (4 supra) are appropriate to be extracted hereunder:

4. Although none of these decisions were concerned with a situation where no appeal was filed against the decision in connected suit but it appears that where an appeal arising out of connected suits is dismissed on merits the other cannot be heard, and has to be dismissed. The question is what happens where no appeal is filed, as in this case from the decree in connected suit. Effect of non filing of appeal against a judgment or decree is that it become final. This finality can be taken away only in accordance with law. Same consequences follows when a judgment or decree in a connected suit is not appealed from.

5. Mention may be made of a Constitution bench decision in Badri Narayan Singh Vs. Kamdeo Prasad Singh and Another, . In an election petition filed by the respondent a declaration was sought to declare the election of appellant as invalid and to declare the respondent as the elected candidate. The tribunal granted first relief only. Both appellant and respondent filed appeals in the High Court. The appellant's appeal was dismissed but that of respondent was allowed. The appellant challenged the order passed in favour of respondent in his appeal. It was dismissed and preliminary objection of the respondent was upheld. The Court observed, "We are therefore of opinion that so long as the order in the appellant's appeal No. 7 confirming the order setting aside his election on the ground that he was a holder of an office of profit under the Bihar Government and therefore could not have been a properly nominated candidate stands, he

cannot question the finding about his holding an office of profit, in the present appeal, which is founded on the contention that that finding is incorrect.

6. Thus the finality of finding recorded in the connected suit, due to non filing appeal, precluded the Court from proceeding with appeal in other suit. In any view of the matter the order of the High Court is not liable to interference.

Similarly, the relevant portion of the decision of the Supreme Court in Shri Ram Prakash's case (5 supra) is appropriate to be extracted hereunder:

...The High Court recording the findings has held thus:

Thus, on the basis of the aforesaid factual as well as legal proposition, it can safely be said that where two connected suits have been tried together and the findings recorded in one of the suit have become final in absence of an appeal, the appeal preferred against the findings recorded in the other suit would definitely be barred by the principles of res judicata. This is the ratio of the above cited case law decided by the apex Court of the country. Thus, there is absolutely no necessity to go into other aspects of the appeal, especially when on factual side, as detailed above, the decree, not appealed against by the present appellant, passed by the first appellate Court, has become final between the parties, which has created a legal bar for the maintainability of the present appeal whereby the decree passed in the other suit has been assailed.

2. It would be obvious that since the claims of the petitioner and the respondents have arisen from the same cause of action and the finding of the appellate Court that damages had accrued to the respondents due to misfeasance or malfeasance having been allowed to become final, the decree which is subject-matter of the SLP cannot be assailed. The self-same question was directly in issue and was the subject-matter of both the suits. The same having been allowed to become final, it cannot be gone into since the same had attained finality, the petitioner having not filed any appeal against the appeal dismissing the suit. In view of this situation, the High Court was right in concluding that the decree of dismissal of the suit against the petitioner would operate as res judicata u/s 11, CPC in the appeal against which the petitioner has filed the second appeal.

The aforesaid decisions clearly apply to the present case.

Further Order XLI Rule 4 CPC, as contended by the learned counsel, has no application, as the said provision deals with power of the appellate Court while considering the appeal and not the powers while considering the review petition, particularly, when one of the connected matters, under a common judgment, has attained finality.

In view of the aforesaid fundamental defect, therefore, the review petition cannot be entertained and is accordingly dismissed.