
(1997) 12 AHC CK 0085

In the Allahabad High Court

Case No : Civil Miscellaneous Review Application No. Nil of 1992, arising out of Writ Petition No. 1184 of 1991

Mitra Prakashan Pvt. Ltd.

APPELLANT

Vs

Union of India & Ors.

RESPONDENT

Date of Decision : 05-12-1997

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (1997) 12 AHC CK 0085

Hon'ble Judges : S.P.Srivastava, J and D.K.Seth, J

Final Decision : Dismissed

Judgement

D.K. Seth, J.—By an order dated 2311992 Civil Misc. Writ Petition No. 1184 of 1991 was dismissed as in fructuous. The said order has been sought to be reviewed by means of this review application.

2. Mr. S.P. Gupta, learned Counsel for the petitioner contends that having regard to the prayers made in the writ petition, the ground on which the writ petition was dismissed as in fructuous, is an error apparent on the face of the record. The Court had committed a mistake in holding that the writ petition had become in fructuous because of the facts disclosed in the order, oblivion of the fact that the entire relief claimed in the writ petition could not be said to be fulfilled. The Court having mistaken the statement of the Counsel as a concession which in fact was not, the same was a ground for review in view of the ratio decided in the case of M.M.B. Catholicos v. M.P. Athanasius, AIR 1954 SC 527. He also relies on the decisions in the cases of Geep Industrial Syndicate Ltd. v. Union of India, 1990 (47) ELT 311 (All), Prestige Engineering (India) Pvt. Ltd. v. Union of India, 1991 (51) ELT 255 (All) and Secretary, Irrigation Department, Government of Orissa and others v. G.C. Roy, JT 1991 (6) SC 349, in support of his contention that refund is liable to be made with interest since it was assessee's money that has been utilised by the Government. Therefore, according to him, nonpayment of interest while refunding the principal after such a long detention of the money

during which the same was utilised by the Government, itself shows that this Court had arrived at a wrong conclusion which is an error apparent on the face of the record.

3. In order to appreciate the contention of Mr. Gupta, it is necessary to briefly refer to the facts of the case.

4. Certain import duty or auxiliary duty were charged by the Government on news print at a higher rate. The imposition of such higher import duty etc. was challenged by the petitioner in Writ Petition No. 5576 of 1981. The said writ petition was connected with the writ petitions of other consumers, all of which were heard and decided by a common judgment dated 6/12/1984 since been reported in 1985 (1) SCC 641. In the said judgment, the Government of India was directed to reconsider within six months entire question of levy of import duty or auxiliary duty payable by the petitioners on newspapers, periodicals etc. with effect from March 1981. If on such reconsideration, the Government decides to modify the levy of import duty or auxiliary duty, it may take necessary steps to implement such decision and till such determination the Government would not insist upon payment of such duties. If after such determination, it is found that the petitioner is entitled to any such refund, the same shall be made by the Government within four months from the date of such determination. The refund clause in the said order has been couched in the following manner:

"(5). If, after such determination, it is found that any of the petitioners is entitled to any refund such refund shall be made by the Government within four months from the date of such determination."

Pursuant to the said order, admittedly the Government had reconsidered and reduced the duty from Rs. 825 per M.T. to Rs. 550 per M.T. Accordingly the petitioners filed 23 refund claims relating to the aforesaid imports effected between 1981 and 1984 on 20/6/1989. The said refund claims having not been allowed, the Writ Petition No. 1184 of 1991 was filed on 10th September, 1991 with a claim that the petitioner was entitled to refund of excess amount paid by it being Rs. 3,59,854.60 P. together with interest at the rate of 18% per annum for the period during which the said amount was utilised by the Government namely, according to it, for the period between 5/10/1985 till the date of filing of the writ petition. Such interest was calculated in the writ petition to be Rs. 4,37,223.37. According to the petitioner, the period for refund as directed in the order of Honble Supreme Court had expired on 5/10/1985. Therefore, detention of the said amount by the Government makes it liable to pay interest thereon.

5. This writ petition was disposed of by order dated 23/11/1992 on the ground that by an affidavit filed by the respondents, it was pointed out that the authority has sanctioned the refund of sum of Rs. 3,58,398.11 P. against 23 refunds filed by the petitioner and that Mr. S.P. Gupta, learned Counsel for the petitioner, stated that his client had received the refund vouchers and therefore in view of above, the petition had become infructuous and accordingly it was dismissed as in

fructuous. The text of the order dated 2311992 is quoted below:

"In this petition, the learned Senior Standing Counsel on behalf of the Central Government has filed an application for disposing of the petition in view of the circumstances mentioned in the affidavit. In para 2 of the affidavit filed in support of the application, it has been stated that the Bombay authorities have sanctioned the refund of Rs. 3,58,398.11 P. against 23 refund filed by the petitioner.

Sri S.P. Gupta, learned Senior Advocate appearing for the petitioner states that his client has received the refund vouchers. In view of the above, the petition has become in fructuous. It is accordingly dismissed as in fructuous."

From the prayer clause in the writ petition, it appears that the petitioner had claimed a sum of Rs. 3,59,854.60 P. together with sum of Rs. 4,37,223.33 P. as interest by way of damages. It was also prayed that the refund money should not be withheld on the ground that the petitioner had passed on the enhanced duty to customers and also to examine for verification of the fact that the petitioner did not pass on the enhanced duty to its customers. Thus, it appears that the question of payment of interest by way of damages as claimed was a matter for determination in the writ petition itself. The order dated 6121984 passed by the Apex Court as quoted earlier does not specify that the refund should accompany interest. Therefore, right of the petitioner to claim damages in the form of interest does not flow directly from the said order, under which refund is being claimed. Then again, the refund was the result of consideration that was to be undertaken by the Government in terms of the said order dated 6121984. The situation which has arisen out of the above facts, does not clearly lay down any entitlement of the petitioner to obtain damages in the form of interest or otherwise. Therefore, it was a case open for decision in the writ petition itself. This fact was well within the knowledge of the petitioner, who had asserted the same in order to obtain the relief claimed. It cannot be said that either the petitioner or its lawyer was unconscious of the claim or relief involved in the writ petition. When the writ petition was dismissed as in fructuous as apparent from the order dated 2311992, it was clear that only a part of the claim in respect of the original amount of which refund was sought, was allowed inasmuch as the principal amount of which refund was sought was mentioned as Rs. 3,59,854.60 P. whereas sum of Rs. 3,58,398.11 P. was sanctioned for refund in consideration of 23 refund claims filed by the petitioner. Having regard to such a situation, learned Counsel for the petitioner had informed the Court that the petitioner had received the refund vouchers.

6. Admittedly, the affidavit was filed on 2311992 and the order was passed on the same day. Learned Counsel for the petitioner did neither ask for time to seek instructions on the same nor he had opposed the application nor did he point out that the relief with regard to interest by way of damages has not been acceded to by the Government and therefore the writ petition has not become in fructuous in as much as if the petitioner or its learned Counsel had insisted on

the claim of interest by way of damages, it could have been pointed out to the Court that simply because of sanction of the alleged amount and receipt of refund vouchers by the petitioner, the writ petition could not have been rendered in fructuous. It cannot be said when a statement to the effect that refund voucher has been received is being made, the learned Counsel was unconscious of the situation that would arise out of such statement particularly when he had allowed the writ petition to be dismissed as in fructuous in his presence. The very statement that his client had received refund vouchers, indicates that the Counsel had been in receipt of instructions from his client otherwise he could not have made such statement.

7. Mr. Gupta had, however, laid much stress on his submission that the order was allowed to be passed by him unconscious of the situation. He also contends that it was the Court's duty to grant interest whenever some amount is withheld presupposing its utilization by the Government by reason of the decisions he had cited as mentioned earlier namely in the case of Gee Industrial Syndicate Limited (supra), Prestige Engineering (India) Pvt. Ltd. (supra) and Secretary, Irrigation Department, Government of Orissa and others (supra).

8. Now so far as the question of payment of interest is concerned, the principle laid down in the said judgments is not in dispute. The petitioner may be entitled to interest by way of damages as claimed. But in the present case having made specific claim in the writ petition itself seeking an adjudication thereon, if the writ petition is allowed to be dismissed as in fructuous upon receipt of the principal amount only without pressing the other relief and without drawing attention of the Court that the petition has not become in fructuous because claim with regard to interest by way of damages is still to be decided, it presupposes either the petitioner has not pressed the same or by implication it had abandoned the claim. A claim which was available to be pressed having not been pressed and the petition having been allowed to be dismissed consciously or unconsciously stares on the face of the petitioner. The dismissal of the writ petition as in fructuous in the facts and circumstances of the case can never be said to be an error apparent on the face of the record because claim of interest was still there particularly when the same was dismissed as in fructuous on the basis of statement of the Counsel. Mr. Gupta had relied on the decision in the case of M.M.B. Catholicos v. M.P. Athanasius (supra). He particularly relied on the observations made in paragraph 36 of the said judgment. His sheet anchor was the observation that the Court had assumed a concession on his part though in fact there was none.

9. The expression that was used in the said judgment would be beneficial for our purpose to be quoted hereinbelow:

"Further, when the error complained of is that the Court assumed that a concession had been made when none had in fact been made or that the Court misconceived the terms of the concession or the scope and extent of it, it will not generally appear on the record but will have to be brought before the Court by

way of an affidavit as suggested by the Privy Council as well as by this Court and this can only be done by way of review. The cases to which reference has been made indicates that misconception of the Court must be regarded as sufficient reason analogous to an error on the face of the record. In our opinion it is permissible to rely on the affidavit as an additional ground for review of the judgment."

10. A perusal of the relevant observations made therein shows that if the judgment is founded on misconception as to the concession made by the Counsel it could be remedied through review as held in the case of *Madhu Sudan v. Mt. Chandrahati*, AIR 1917 PC 30 (1) and such misconception by the Court of a concession made by the Advocate is a good and cogent ground for review as held in the case of *Govinda Chettiar v. Varadappa Chettiar*, AIR 1940 Mad 17 (J). Therefore, if the Court assumes that a concession has been made when none in fact been made or that the Court misconceived the terms of concession and scope or extent of it, it should be done away by way of review,

11. In view of the above ratio, it is required to be examined as to whether same applies in the present facts and circumstances of the case. Moot question that arises is as to whether in the present case the Court had assumed any concession or had any misconception about the terms of such concession or scope or extent thereof. Though at the bar a very impressive argument has been built up by Mr. Gupta almost leading us to agree with his contention, but from the review application it does not appear that such a case has been sought to be made out as a ground for review. The only statement when pointedly asked by the Court Mr. Gupta could place before the Court, is the statement made in paragraph 8 of the review application which is quoted below:

"8. That it seems that the aforesaid facts that the petitioner was entitled to interest as submitted above and the interest had not been received could not be pointed out to the Honble Court due to some inadvertence. The inadvertence on behalf of the petitioner is regretted."

12. Thus, it was never pleaded that the Counsel had made any concession or that there was any misconception about the terms of concession or the scope or extent thereof. It was also not pointed out that it was a mistake on the part of the Counsel. On the other hand, the case that was made out is that through inadvertence it could not have been pointed out that the interest was not received and such inadvertence was being regretted by the petitioner. The statement goes to show that the inadvertence was that of the petitioner, who had been regretting the same. Thus, it appears that the petitioner though aware of the situation had never instructed the Counsel to press for interest. It is also not a case that the petitioner had never instructed the Counsel to make the statement that has been made in the present case. On the other hand, much stress was given by Mr. Gupta to the contention that it was for the Court to enquire even without asking as to whether interest has been paid or not. It was a mistake of the Court which should not have come to the conclusion that despite

existence of prayers for interest the writ petition had become in fructuous only upon refund of the principal amount. It is for the petitioner to press or not to press a claim. Unless the petitioner insists on a particular relief, it is not for the Court to grant the same even without asking. When the Court had come to the conclusion that the writ petition has become in fructuous, it was for the Counsel or the litigant, who ought to have instructed his Counsel, to point out that it has not become in fructuous because one of the reliefs has not been obtained. In the present case, interest was not claimed as of right, but it was claimed by way of damages. Damages is a case which requires determination by Court. It was an issue involved in the proceeding awaiting adjudication. If the Court is not called upon to adjudicate, in that event it was not necessary for the Court to embark upon such exercise.

13. The attitude shown by the learned Counsel in the present case does not conceive of any scope to hold that it had given a wrong impression to the Court. It was for the party or his Counsel to press or not to press a claim when by the application dismissal of the writ petition was sought supported through an affidavit that the writ petition should be dismissed because of sanction of amount different from the amount claimed specifically. Omitting to mention anything about interest clearly indicates that all sum has been sanctioned and the party admits to have received refund vouchers for the said amount and no objection having been raised either to the taking up of the application or to the passing of the order on the said application, it cannot be presupposed that the Court had misunderstood the attitude of the Counsel or party. However, in the absence of any such pleading made out specifically in the application for review itself that such a ground as has been contemplated in the case of *M.M.B. Catholicos* (supra) do exists, it is not possible to supply the said ratio. Inasmuch as a ratio is applicable in a given facts. In the absence of such pleading to bring the case within the ambit of the facts leading to the ratio so laid down in *M.M.B. Catholicos* (supra), it would be preposterous to apply the said ratio in the present case even though the petitioner may claim interest relying on other decisions cited at the bar referred to above.

14. Thus, unless a proper ground is made out however attractive and impressive may be the argument at the bar, a ratio though supporting such argument, cannot be applied. The case as made out for review must satisfy the test of the principles on which the Court can entertain the review application. In the present case, lack of proper ground for review prevents us despite great persuasive effect of the contention of Mr. Gupta. For all these reasons, we are unable to persuade ourselves to agree with the contentions of Mr. Gupta for allowing the review application on the grounds sought to be advanced having regard to the case as made out in the application for review.

15. The review Application is therefore dismissed. There will be however no order as to costs.

Review application dismissed,