
(1991) 10 AHC CK 0042

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 29774 of 1991

Nand Kishore Kanaudia and Another

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 28-10-1991

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 132, 133, 136, 226
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 273
Prevention of Adulteration of Food, Drugs and Cosmetics (Uttar Pradesh Amendment) Act, 1974 — Section 3, 4
Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 132, 133, 136, 226
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 273
Civil Procedure Code, 1908 (CPC) — Section 11
Prevention of Adulteration of Food, Drugs and Cosmetics (Uttar Pradesh Amendment) Act, 1974 — Section 3, 4
Constitution of India, 1950 — Article 132, 133, 136, 226
Criminal Procedure Code, 1973 (CrPC) — Section 161
Penal Code, 1860 (IPC) — Section 273
Prevention of Adulteration of Food, Drugs and Cosmetics (Uttar Pradesh Amendment) Act, 1974 — Section 3, 4

Citation : (1992) CriLJ 953

Hon'ble Judges : G.D. Dubey, J;A.P. Misra, J

Bench : Division Bench

Advocate : H.N. Singh, for the Appellant;

Final Decision : Dismissed

Judgement

A.P. Misra, J.—Heard learned counsel for the petitioners. The petitioners seek quashing the First Information Report dated 29-4-1989 giving rise to Case Crime No. 149 of 1989, Police Station, Robertsganj, District Sonbhadra including stay of their arrest. The petitioners have further sought for quashing the provisions contained under Sections 3 and 4 of the Prevention of Adulteration of Food,

Drugs and Cosmetics (U. P. Amendment) Act, 1974 (Act No. 47 of 1975) being ultra vires of the Constitution of India. It is not disputed that the petitioners even earlier filed a writ petition (Writ Petition No. 12088 of 1989) in this Court for quashing the same aforesaid First Information Report giving rise to the same Case Crime No. 149 of 1989 and also for stay of their arrest which was dismissed by this Court vide its order 5th May 1989, Annexure-9 of the writ petition. The writ petition after hearing learned counsel for the petitioners was dismissed with a direction that in case petitioners surrender with an application for bail u/s 273, I.P.C. to the court concerned. Their bail application should be considered and disposed of on the same day. After having obtained the aforesaid relief the petitioners have now again filed this second writ petition for quashing the same First Information Report in the same case crime number and also for staying their arrest on additional ground of the validity of Ss. 3 and 4 of Prevention of Adulteration of Food, Drugs and Cosmetics (U.P. Amendment) Act, 1974 (U.P. Act No. 47 of 1975). It is on this basis learned counsel for the petitioners has urged that this new ground and relief were not taken earlier and, therefore, he has filed the present writ petition. Sole relief of declaration of any provision as ultra vires cannot be taken by any person, it can only be taken by a person affected by that provision. In the present case the petitioners are affected by the aforesaid First Information Report and their arrest for which they have filed the earlier writ petition and for the same relief they have filed the present writ petition on additional ground of challenging the provision of the aforesaid sections of the said Act. Challenging the validity of the aforesaid provisions correlates to the relief sought for by the petitioners in the earlier writ petition that is for quashing the First Information Report and staying the arrest of the petitioners. In fact, challenging the aforesaid provisions of the said sections of the aforesaid Act, though is also one of the reliefs but in effect it could be an additional ground, in our considered opinion, for challenging the same First Information Report and for the same relief.

2. In strict sense Section 11 may not be applicable in proceedings under Article 226 of the Constitution of India but its underlying principle is and has always been made applicable to these proceedings. But for this no finality could be reached in any litigation. Principle of constructive res judicata is a point which ought to be taken if not taken could also be covered by the principle of res judicata. Unless this is done a party for the same relief may seek his redress on few grounds and being unsuccessful on few grounds could in the second innings by filing fresh petition again raise the remaining grounds for the same relief. It is for this Court to see whether subsequent proceeding arises out of the same cause of action or different. If cause of action in the same, second proceeding would not be maintainable.

3. Learned counsel for the petitioners has relied on a decision given by the Supreme Court in the case of Indian Oil Corporation Ltd. Vs. State of Bihar and others, . Reliance placed by the petitioners" counsel is that since the earlier writ petition was dismissed in limine, hence the principles of either res judicata or

constructive res judicata will not apply even if he has filed the second writ petition in this court for quashing the First Information Report. In the aforesaid Supreme Court's decision it has been held;

Dismissal in limine of SLP by a non-speaking order by Supreme Court will not preclude a party from seeking the same relief under Article 226 on the identical grounds.

4. That was a case in which the SLP was filed before the Supreme Court challenging the award of the Industrial Tribunal which was dismissed in limine. Since dismissal of SLP no decision was given and that arose out of proceeding out of the order of Tribunal, it was held that the proceeding under Article 226 before the High Court is not barred. The facts in the present case are different. Here earlier writ petition was filed by the very petitioners in this Court wherein the same First Information Report of the same crime number was sought to be quashed including the stay of their arrest.

5. The argument is that since earlier writ petition was dismissed in limine, in view of the aforesaid Supreme Court's decision, the second writ petition would not be barred. The argument is not sustainable on two grounds. Firstly, as the said decision does not apply to the facts of this case and on the contrary, even if the earlier writ petition could be treated to have been dismissed in limine, the only remedy open to the petitioners was by preferring an appeal against the said order under Article 132, 133 or 136 of the Constitution of India. See P.L. Lakhanpal Vs. Union of India (UOI) and Others, , Ramesh and Another Vs. Seth Gendalal Motilal Patni and Others, , British India Corporation Ltd. and Others Vs. The Industrial Tribunal, Punjab and Another, . Secondly, we find from the earlier order that partly relief was granted to the petitioners and instead of staying their arrest their bail application was directed to be considered by the court on the same day in order that their bail application is disposed of before them so that they may not be kept in jail as is normally done.

6. It is true that in the earlier writ petition the validity of the said provisions was not challenged which is challenged now. If argument of the learned counsel for the petitioners is accepted then if the earlier writ petition is dismissed, then on new grounds the petitioners will have right to file the second writ petition which apart from eroding the principles of constructive res judicata will also prolong the litigation between the parties. In our considered opinion, the principle enunciated by the Supreme Court as relied is not applicable. On the other hand, petitioners had the right of preferring an appeal against the said judgment to the Supreme Court as aforesaid. It is not in dispute that the petitioners are seeking the same relief on the same cause of action and on principles of constructive res judicata the petitioners would be precluded to raise it in their second writ petition. The decision in the case of Forward Construction Company v. Prabhat Mandal, AIR 1986 SC 391/ paras 20 and 21 specifically refers to a case where ground which ought to have been taken into previous writ petition and was not taken will also be barred on the principles of Explanation 4 to Section 11, C.P.C.

7. The second point urged by the learned counsel for the petitioners is that after filing the first writ petition, statement of a witness has been recorded u/s 161, Cr. P.C. by the Investigating Officer through which the complicity of the petitioners in the said crime is not proved. It is not in dispute that that the matter is under investigation. It is not proper for this Court to judge at every stage of the investigation regarding complicity of an accused. It would not be appropriate for this Court to entertain the second writ petition even on their additional ground. If the submission of the petitioners' counsel is correct that in view of the statement recorded u/s 161, Cr. P. C. the complicity of the petitioners is not proved, then the final report would be submitted but that could not be the ground for interference by this Court in this petition.

8. In view of the aforesaid facts and circumstances we decline to interfere in the investigation of the case and to quash the First Information Report on both the aforesaid findings. Accordingly, this writ petition is dismissed.