
(2004) 05 JH CK 0018

In the Jharkhand High Court

Case No : Writ Petition (T) No. 5832 of 2003

Nicco Jubilee Park Ltd.

APPELLANT

Vs

State of Jharkhand and Others

RESPONDENT

Date of Decision : 05-05-2004

Acts Referred:

Bihar Entertainment Tax Act, 1948 — Section 14, 3, 4, 5, 5(2)
Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 226

Citation : (2004) 3 JCR 7

Hon'ble Judges : P.K. Balasubramanyan, C.J.;Tapen Sen, J

Bench : Division Bench

**Advocate : Debi Pal, M.S. Mittal, N.K. Pasari and A.K. Yadav, for the Appellant;
K.K. Jhunhunwala, G.P. III, for the Respondent**

Final Decision : Dismissed

Judgement

P.K. Balasubramanyan, C.J.—This writ petition filed by M/s. Nicco Jubilee Park Limited, hereinafter referred to as the Company, prays for the issue of a writ of certiorari to quash the notice dated 9.5.2003 issued by the Assistant Commissioner of Commercial Taxes, directing the company to furnish security for the purpose of issuance of a registration certificate under the Bihar Entertainments Tax Act, 1948, hereinafter referred to as "the Act", for directing a refund to be made pursuant to a revisional order for quashing the orders and notices demanding tax under the Act and for a declaratory relief that until the respondents issue a proper notification u/s 5(2) of the Act specifying the company as a place of entertainment, the liability of the company under the Act does not commence and for other ancillary reliefs connected therewith. Subsequently, LA. No. 334/04 was filed for an amendment of the writ petition by seeking to challenge the two demands made to the company for the periods 3.6.2001 to 31.3.2002 and 1.4.2002 to 31.3.2003. The reliefs regarding security, registration and the refund claimed, stand taken care of by an interim order passed by, this Court in this writ petition on 3.12.2003 and the said order to the

extent it is material reads thus :--

"Having heard both sides, we stay the direction of the Assistant Commissioner of Commercial Taxes (Incharge) Jamshedpur, Urban Circle, Jamshedpur (respondent No. 5) calling upon the petitioner to furnish the security bond by way of two sureties for sums of Rs. 20,00,000/- (Rupees" Twenty lacs) each, as a condition precedent for registration made u/s 6 of the Entertainments Tax Act, 1948 (hereinafter referred to as "the Act"). The petitioner will deposit a sum of Rs. 5,000/- (Rupees five thousand) towards security as provided by Section 7(2) of the Act. On such deposit being made, we direct the Assistant Commissioner . Commercial Taxes to consider the application for registration made by the petitioner and pass an order thereon without delay. We also direct the Deputy Commissioner of Commercial Taxes, Urban Circle, Jamshedpur (respondent No. 4) to pass appropriate orders forthwith on the application made by ? the petitioner on 15.10.2003 based on the revisional order regarding the attachment effected. The said order will be passed within ten days from today."

2. It is submitted that pursuant to the interim direction, the company produced security for Rs. 5000/- and it was granted a certificate of registration u/s 6 of the Act. The Government counsel also did not seek to re-open that aspect of the writ petition during the hearing and hence it has become unnecessary to advert to the aspect dealt within our order quoted above.

3. What remains is the prayer of the writ petitioner for a declaration that the Act cannot be enforced against the company or its amusement park unless and until a notification in terms of Section 5(2) of the Act is issued by the Government. In other words, according to the Company, the Act can be applied and the company compelled to pay the tax under the Act, only on the issuance of a notification u/s 5(2) of the Act specifying the places of Entertainment for the purposes of Clauses (a), (b) and (c) of Sub-section (1) of Section 5 of the Act. In short, the contention of the petitioner is that even if the Act could be made applicable to the Park maintained by the company to which admission is restricted by tickets, the tax could actually be imposed and recovered from the company only if the Park is specified as a place of Entertainment by a notification in the official gazette in that behalf. This claim of the company is sought to be met on behalf of the respondents on various grounds and predominantly on the ground that the said plea or the claim for relief on that basis is barred by res judicata by virtue of the decision in WP (T) No. 2229 of 2002. On behalf of the Company, this plea was sought to be got over by pleading that the question raised by the company in this writ petition and the relief claimed herein was not the subject matter of the earlier writ petition and consequently, the dismissal of the earlier writ petition by this Court would not operate as res judicata on the present plea or bar the grant of relief claimed in this writ petition.

4. Before proceeding to consider the merits of the case of the company based on the need for a notification u/s 5(2) of the Act, we think that it is proper to consider and decide the question of res judicata raised by the respondents. After

all, if the plea of res judicata were to be upheld, it will be unnecessary to go into the merits of the contention raised by the company, though for the completion of the judgment and to avoid any remand of the proceedings to this Court, in case the Supreme Court were to disagree with the finding of res judicata, this Court may also consider the arguments on merits even if the plea of res judicata were to be upheld.

5. The earlier writ petition WP (T) No. 2229 of 2002 [see Nicco Jubilee Park Ltd. Vs. State of Jharkhand and Others, was filed by the, company, inter alia, for the following relief :

"For a declaration that the petitioner is not liable to pay the Entertainment tax under the provisions of the Bihar Entertainments Tax Act, 1948 and the rules framed thereunder on the grounds set out therein."

The grounds set out were that the State Government has not issued any notification levying tax on an amusement park in exercise of its power u/s 3(1) of the Bihar Entertainments Tax Act, 1948 as substituted by Act (3 of 1977). The other ground was that the company was entitled to exemption u/s 10 of the Act, since it was exempt by virtue of the notification issued u/s 10(2) of the Act and in view of Section 10(1)(b)(c) of the Act. the writ petition was filed when the authorities refused to grant the company the exemption it claimed u/s 10(1)(b) (c) of the Act after an inspection made of the Park. The immediate cause for filing of the writ petition was the communication dated 7.12.2001 by which the company was directed to take steps for getting itself registered under the Act. Section 6 of the Act to the extent it is relevant for the present purpose reads thus :--

"6. Registration of proprietors of entertainment.--(1) No proprietor of any entertainment shall, while being liable to pay the entertainments tax under this Act, carry on business as such proprietor unless he has been registered under this Act in the prescribed manner and possesses a registration certificate.

(2) Every proprietor required by Sub-section (1) to be registered shall make an application in this behalf in the prescribed manner to the prescribed authority.

(3) On receipt of an application, the prescribed authority shall, if he is satisfied that the application is in order, register the applicant and grant him a certificate of registration in the prescribed form."

(4) Omitted as not necessary.

(5) Omitted as not necessary."

6. According to the company, it was not bound to get itself registered in the absence of a notification u/s 3 of the Act fixing the rates of taxes to be collected from the said amusement park and in the alternative, because the company's park was entitled to exemption contained in Section 10 of the Act. Among the various grounds raised in that writ petition, two grounds may be relevant in this

context In paragraph 20 of the writ petition, it was put forward that the State Government has not issued any notification levying tax on amusement parks in exercise of power u/s 3(1) of the Bihar Entertainments ,Tax Act, 1948 as it stands substituted by Act (3 of 1977).

7. In paragraph 39 it was put forward that the petitioner is not liable to pay Entertainment tax under the Bihar Entertainments Tax Act, 1948 especially in view of the fact that the State Government (erstwhile State of Bihar and the State of Jharkhand) has not issued any notification for levying Entertainment tax on amusement parks u/s 3 of the Bihar Entertainments Tax Act, 1948. What was essentially projected in support of the prayer for the declaratory relief quoted above was that there was no notification bringing amusement parks as the one run by the company, within the purview of the Act enabling the authority to charge tax under the Act in terms of Section 3(1) of the Act. This claim of the company was disputed by the State and ultimately, this Court rendered the final decision in the writ petition on 16.1.2003. After referring to the. various arguments raised at that time, the Division Bench of this Court rendered the following findings :--

"On a totality of the circumstances, therefore, we have no doubt that the petitioner is liable to pay Entertainment tax and has all along been liable to pay tax right from the date it set up, commissioned and started its amusement park."

8. The Court also held that the company was not liable to exemption u/s 10 of the Act. After referring to Section 6 of the Act providing for registration quoted above, the Division Bench also held :--

"Undoubtedly, it goes without saying that it is the statutory obligation of the petitioner and it has been its statutory obligation all along, to get itself registered u/s 6 and the failure to do so brings with it all adverse consequences as per law."

9. The writ petition was thus dismissed with costs. Though a petition for Special Leave to appeal was filed in the Supreme Court by the company as Petition for Special Leave to Appeal (C) No. 6469 of 2003, the same was dismissed by order dated 21.4.2003. Thus, the judgment of this Court referred to above became final.

10. As we see it, the effect of the said decision is that the company was liable to pay entertainment tax under the Act all along from the date it set up, commissioned and started its amusement park; that it had the statutory obligation to get itself registered u/s 6 of the Act and its failure to get so registered, brought with it the adverse consequences as laid down in the Act.

11. Learned counsel for the company submitted before us that in the earlier writ petition, no ground based on the need for a notification u/s 5(2) of the Act was raised and such a question was not considered or finally decided. Therefore, it could not be said that the present plea of the company that it could not be taxed under the Act in the absence of a notification u/s 5(2) of the Act could not be

held to be barred by *res judicata*. Only when the issue is heard and finally decided in a prior proceeding inter parties, can the same be said to operate as a *res judicata* and in the absence of any specific adjudication on the question now sought to be raised, the plea of *res judicata* raised by the learned counsel for the respondents has no merit. Learned Government counsel, on the other hand, submitted that what the company sought in the earlier writ petition was a declaration that it was not liable to tax under the Act and the finding of this Court was that the Company was liable to pay tax under the Act right from the date, the park was commissioned and that the failure of the company to get itself registered under the Act from the inception of the park, brought with it the consequences prescribed by the Act. The petitioner cannot get over this declaration by this Court by seeking to raise a contention based on the absence of a notification u/s 5(2) of the Act. Nor can this Court, in the face of the earlier decision, declare that the Company is not liable to pay tax under the Act. The grant of such declaration would go clearly against the earlier adjudication inter parties and it would be in the teeth of the declaration of this Court that the Company was and has all along been liable to pay tax under the Act.

12. It is, no doubt, true that the company is not seen to have put forward a specific contention based on absence of a notification, u/s 5 (2) of the Act. But as we have noticed, the company did put forward a specific contention that its amusement park was not liable to be taxed since there was no notification bringing the amusement park within the purview of the charging section under the Act. In view of the grounds raised and the declaration sought, it appears to us that the prayer in the earlier writ petition was sufficiently wide as to attract arguments based on the various provisions of the Act and the insistence upon the need for a notification bringing an amusement park within the purview of the Act was clearly involved in that adjudication, either expressly or impliedly, in deciding the question whether such a notification was necessary or not. Even assuming that the ground based on the absence of a notification u/s 5(2) of the Act was not specifically taken as a ground in the earlier writ petition, it is clear that it was a ground which might and ought to have been raised in the earlier writ petition in support of the omnibus prayer made therein that the company should not be taxed under the Act.

13. In our view that there is an overruling of the contention based on Section 5(2) of the Act by implication in the earlier writ petition, obviously, the decision in the earlier writ petition would operate as *res judicata*. But if that view is not correct, then the question is whether the principle of constructive *res judicata* would apply to this case, since the plea based on the absence of a notification u/s 5(2) of the Act "might and ought" to have been raised in the earlier writ petition.

14. We have already quoted the relief sought for in the earlier writ petition. That relief essentially sought a declaration that the company was not liable to be taxed under the Act and the finding was that the company was liable under the

Act and it was so liable from the date of its commissioning the amusement park. If the company had a contention that it was not liable to be taxed under the Act in the absence of a notification u/s 5 (2) of the Act, it might and ought to have raised such a contention in the earlier writ petition in support of its prayer for declaration. It is by now well settled that the rule of res judicata applies to writ proceedings (See *Devilal Modi, Proprietor, M/s. Daluram Pannalal Modi Vs. Sales Tax Officer, Ratlam and Others*, ; *G.K. Dudani and Others Vs. S.D. Sharma and Others*, . We are not multiplying authorities on this aspect, since it was not argued that the principles of res judicata were not applicable to writ proceedings. That the principle of "might and ought" or rule of constructive res judicata would apply to writ proceedings is also clear from the decisions in the *State of Punjab and others Vs. M/s. Surinder Kumar and Co. and others*, and *Maharashtra Vikrikar Karamchari Sangathan Vs. The State of Maharashtra and Another*, . Moreover, in view of the decision of the Supreme Court that the rule of constructive res judicata is only a part of general principles of res judicata and it is founded on consideration of public policy that finality should attach to binding decisions pronounced by Courts of competent jurisdiction and that no one should be vexed twice over the same cause, we have necessarily to hold that when general principles of res judicata apply, the rule of constructive res judicata will also apply. Therefore, we are satisfied that the company "might and ought" to have raised this ground in the earlier writ petition, since it was available to it when the earlier writ petition was filed in support of its prayer for declaration that it was not liable to tax under the Act as things existed then and as they exist now.

15. Learned counsel for the company attempted to argue that the cause of action put in suit in the earlier writ petition was different from the one that is now sought to be put forward. He contended that in the earlier writ petition, the claim was based on the absence of a notification, or a valid notification u/s 3(1) of the Act and in the present case, the claim was based on the absence of a notification u/s 5(2) of the Act. But considering the prayer made and the decision rendered by the Division Bench in the earlier writ petition, we find it impossible to accept this argument. When the company raised the contention that it could not be taxed under the Act, it was necessary for it to put forward all the grounds available to it in support of that plea and the declaration it had sought for in the earlier writ petition. It cannot keep in reserve some argument on the basis of which it could have got the declaration prayed for in the earlier writ petition and rest its claim on some of the grounds alone. That a ground cannot be reserved or kept back to be put forward in a fresh litigation is now clear from several decisions of the Supreme Court. We think that it is necessary only to refer to the decision of the Supreme Court in the *State of U.P. Vs. Nawab Hussain*, , wherein after discussing the principle in detail, it was held that the ground which was available when an earlier writ petition was filed challenging the order of dismissal could not thereafter be resurrected in a subsequent litigation, though the second proceeding involved in that case was a suit. In that case, the writ petition was

filed challenging the disciplinary proceedings and the order of dismissal on the ground that the principles of natural justice were violated. The writ petition was finally dismissed. An available ground that the order of dismissal was passed by an authority who held a rank below the appointing authority and hence was incompetent to pass an order of dismissal, was omitted to be raised in the writ petition. After the dismissal of the writ petition, a suit was filed raising that contention. The Allahabad High Court found that the ground raised of want of authority in the Authority that issued the order of dismissal, was valid and proceeded to grant the plaintiff the relief sought for by him. This was challenged in the Supreme Court and the question that arose before the Supreme Court was whether this ground which was not raised in the earlier writ petition could be permitted to be raised in the subsequent suit. The Supreme Court, reversing the decision of the Allahabad High Court, clearly held that a cause of action cannot survive a judgment and on the general principles of *res judicata*, if a person chooses to sue only upon one of the causes of action leaving out others and courted a decision, it would not be open to him to resurrect the other cause of action in support of a fresh challenge to the very ground complained of in the earlier proceeding. As observed by Spencer-Bower & Turner on *res judicata*, the cause of action gets merged in the decree and it gets an exalted burial and once that happens, the cause of action cannot again be resuscitated. The said principle, in our view, clearly covers the situation. This was a ground which was available to the company in support of its prayer for, declaration that it was not liable under the Act and the company not having put forward this ground in the earlier writ petition, is barred by *res judicata*, from raising that contention again. In this context, at the risk of repetition, we may observe that what the Court found, in the earlier writ petition was that the company was and has, all along been, liable under the act from the date its park was commissioned and it had invited the consequences of not getting a registration under the Act.

16. Therefore, the contention in the present writ petition that until the respondents issue a proper notification u/s 5(2) of the Act specifying the company as a place of Entertainment for the purpose of Section 5(1) of the Act the liability of the company would not commence, is clearly barred by *res judicata*.

17. In the judgment in WP (T) No. 2229 of 2002, this Court had specifically held that the writ petitioner was liable to pay Entertainment tax and had all along been liable to pay the tax right from the date it set up, commissioned and started its amusement part. Thereafter, referring to Section 6 of the Act, this Court further held that it was the statutory obligation of the Company to have itself registered as the proprietor of the Entertainment u/s 6 of the Act and the failure to do so brought with it all adverse consequences as per law. These two findings are clearly binding on the writ petitioner, they having become final inter parties. It is, therefore, not open to the writ petitioner in this writ petition to argue that it was not liable to pay Entertainment tax for its amusement park from the date of the commissioning of the park. It is also not open to the writ

petitioner to argue that it had no statutory obligation to get itself registered u/s 6 of the Act from the date of its commissioning of the park and failure to do so had brought with it all adverse consequences as provided in law. In this clear situation, the argument on behalf of the writ petitioner that it has no liability either to pay any tax under the Act or to get itself registered under the Act in the absence of a notification u/s 5(2) of the Act cannot be entertained by this Court. This Court, a Court of co-equal jurisdiction, is bound by the findings rendered by a Division Bench of this Court earlier and the declaration made by it that the writ petitioner was liable to pay tax under the Act. The argument, therefore, that the writ petitioner had no liability to pay tax or to get itself registered under the Act from the very date of the commissioning of the park in the absence of a notification u/s 5(2) of the Act has only to be overruled.

18. Assuming that our conclusions on the petitioner being barred by res judicata from raising the claim and the effect of the earlier declaration made by this Court is not sustainable, we will also consider the argument on behalf of the writ petitioner on merits for completion of this judgment and to avoid any possible remand of the proceedings to this Court, in case the Supreme Court were to take a different view on the above two aspects.

19. An "entertainment" is defined in the Act as including any exhibition, performance, amusement, gain, sport or races to which persons are admitted for payment. The petitioner has commissioned an amusement park. Therefore, going by the definition contained in Section 2(d) of the Act, the park is an entertainment, since the admission to it admittedly is for payment. Similarly, the petitioner is clearly a proprietor of an Entertainment in terms of Section 2(j) of the Act. "Proprietor" in relation to any Entertainment includes any person responsible for, or for the time being in charge of the management thereof. It is clear that the petitioner satisfies the definition of proprietor as above. It may also be noted that the definitions are inclusive definitions and even otherwise, if one were to find that the amusement park run by the petitioner is an entertainment as understood in common parlance, the park of the petitioner would qualify as an entertainment and the petitioner would qualify as the proprietor of an entertainment under the Act. Section 3 of the Act, the charging section, provides that subject to the provisions of the Act, there shall be levied and paid to the State Government an Entertainment Tax at a rate specified therein and such tax shall be payable by the proprietor of the Entertainment. This casts an obligation on the writ petitioner to collect and pay Entertainment Tax to the Government on the admission of public to its amusement park when persons are admitted for payment. Section 4 of the Act imposes an obligation on the proprietor of an Entertainment to collect an Entertainment Tax from persons admitted to entertainment. That section confers a right on the proprietor to collect the tax from persons admitted to entertainment. In fact, it is an obligation imposed on the proprietor. Obviously, the intention behind the collection is with a view to make over that collection of tax to the State Government in terms of Section 3 of the Act. Therefore, reading the definitions with Sections 3 and 4 of the Act, it

appears to us to be clear that the writ petitioner, as the proprietor of an entertainment, has the obligation to collect the tax from persons admitted to the entertainment and also to pay over that tax to the State Government as envisaged by the Act. To ensure that the amounts are collected and paid by the proprietor of the entertainment. Section 6 of the Act provides for registration of proprietors of entertainments. Sub-section (4) of Section 6 also provides for consequences of failing to apply for registration by a proprietor. Thus, Section 6 also provides for consequences of not getting itself registered and collecting and paying the Entertainment Tax under the Act in addition to the penalty imposed by Section 16 of the Act. Section 8, in our view, only reiterates the obligation of the proprietor of an Entertainment to collect and make over the tax due under the Act to the State Government. Section 9 provides for filing of returns by the proprietor and the procedure for an assessment and collection and the machinery for assessment and collection followed by other provisions relating to mode of recovery. These sections also only re-emphasize the obligation of the proprietor of an entertainment to collect the tax and make over to the Government.

20. The case sought to be built up by the petitioner is based on Section 5 of the Act. Section 5 deals with admission to entertainment. Section 5(1) provides that save as otherwise provided in the Act, no person other than a person who has some duty to perform in connection with the entertainment, or a duty imposed upon him by or under the Act or any other law, shall be admitted to any entertainment in respect of which entertainment tax is payable u/s 3 of the Act. It appears to us at the first blush that Section 5 relates to a person who seeks admission to an entertainment. It does not touch open the obligation of a proprietor of an entertainment which is covered by Sections 3 and 4 of the Act. Clauses (a), (b) and (c) of Sub-section (1) of Section 5 provides that a person who seeks admission to an entertainment should have a ticket or a complimentary ticket and further provides that complimentary tickets should be in prescribed form in the three contingencies referred to in the three clauses. Then follows Sub-section (2) of Section 5 which reads thus :

"(2) The State Government shall, by a notification published in the official gazette, specify the places of entertainment for the purposes of Clauses (a), (b) and (c) of Sub-section (1)."

21. There is a proviso to Sub-section (2) which is not very relevant for our purpose. Sub-section (3) of Section 5 provides that nothing contained in Sub-sections (1) or (2) shall apply to an entertainment, where entry is regulated by any mechanical contrivance used for the purpose of review under the Act. What is argued on behalf of the writ petitioner is that only if the notification is issued by the Government u/s 5(2) of the Act, specifying the places of entertainment for the purposes of Clauses (a), (b) and (c) of Sub-section (1), the proprietor of an entertainment could not collect any tax from a person seeking admission. As we have noticed, Sub-section (1) of Section 5 deals with a person seeking admission to an entertainment, and not with a proprietor of entertainment. A person

seeking admission under Clause (a) has to have a ticket or a complimentary ticket in the prescribed form or under Clause (b), has to have a ticket or a complimentary ticket to be supplied by the State Government in the prescribed form or a ticket or a complimentary ticket in the prescribed form which shall be stamped with an impressed, embossed, engraved or adhesive stamp by the State Government. The notification u/s 5(2) of the Act only contemplates specification of places where any ticket or complimentary ticket can be used or a ticket or complimentary ticket to be supplied by the State Government can be used, or a ticket or a complimentary ticket stamped by the State Government can be used. In other words, it appears to us that the notification u/s 5(2) of the Act is directed at a person who wants to get admitted to an entertainment and it has nothing to do with the obligation of the proprietor, cast on him by Sections 3, 4 and 6 of the Act. We are, therefore, inclined to the view that the argument of learned counsel for the petitioner that in the absence of a notification u/s 5(2) of the Act, the proprietor of an entertainment has no obligation to collect tax and pay it to the Government cannot be sustained. Section 5, in our view, does not affect the right and the obligation of a proprietor of an entertainment to collect tax from a person seeking admission and pay over the taxes collected, to the State Government. Even on merits, we are of the view that the contention of the writ petitioner cannot be sustained.

22. By way of amendment, the writ petitioner has sought to challenge the notice of demand issued to the writ petitioner subsequent to the filing of the writ petition. Though a contention was sought to be raised that the assessment was completed without giving the petitioner an opportunity to put forward its case and that contention is controverted by the Government counsel by bringing to our notice the acknowledgement of notice of hearing given on behalf of the writ petitioner, we are not inclined to go into the merits of those contentions, since we find that the writ petitioner has a right of appeal u/s 14 of the Act. By availing, itself of that remedy, it is for the writ petitioner to canvass the correctness of the demand made against it and the sustainability of the order of assessment made against it by the concerned authority. We are, therefore, not inclined to go into the sustainability or otherwise of the assessment made and the demand notice issued, and leave it open to the writ petitioner to challenge the same before the appropriate appellate authority under the Act. In other words, we make it clear that the dismissal of this writ petition is without prejudice to the right of the writ petitioner to challenge, the assessment and the consequent demand notice before the appellate authority. We are sure that the appellate authority will take note of the pendency of this writ petition while entertaining the appeal that may be filed.

23. For the reasons stated above and subject to the liberty given to the writ petitioner in the immediately preceding paragraph, this writ petition is dismissed.