

(2015) 11 PAT CK 0062

In the Patna High Court

Case No : Civil Writ Jurisdiction Case No. 2848 of 2011

Noman Alam

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 26-11-2015

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 11
Constitution of India, 1950 — Article 141, 142, 226, 32
Customs Act, 1962 — Section 111(b), 112, 115(2), 122, 125

Citation : (2016) 331 ELT 163

Hon'ble Judges : Mihir Kumar Jha, J.

Bench : Single Bench

Advocate : Yogendra Mishra, Advocate, for the Appellant; Archana Meenakshee, for the Respondent

Final Decision : Dismissed

Judgement

Mihir Kumar Jha, J.—Heard learned counsel for the parties.

2. The prayer of the petitioner in this writ application reads as follows:

"1.(i) An appropriate writ, order or direction declaring the entire action of the respondent 1st party as mentioned in the release order dated 04.08.2005 (Annexure-8) as illegal, arbitrary void and without jurisdiction, be issued.

(ii) An appropriate writ, order or direction commanding the respondents to either deliver the seized articles or to pay the price thereof adjusting the penalty of Rs. 25,000/- within a time frame, be issued."

3. Before the learned counsel for the petitioner could make his submissions, a preliminary objection was raised by the learned counsel for the respondents as with regard to maintainability of the present writ application on the ground that the petitioner's earlier writ application, C.W.J.C. No. 12114 of 2006, for an identical relief had not only been dismissed by the learned single Judge of this Court by an order dated 30.04.2007 in C.W.J.C No. 12114 of 2006 but was only

affirmed by the Division Bench in a Letters Patent Appeal filed by the petitioner, vide an order dated 08.10.2007 in L.P.A. No. 480 of 2007, the Apex Court also has dismissed the Special Leave Petition filed by the petitioner being S.L.P. No. 6662 of 2008, and, therefore, no fresh writ application would lie for the same cause of action on the ground of res judicata and constructive res judicata.

4. Mr. Yogendra Mishra, learned counsel for the petitioner, while meeting the aforementioned preliminary objection, has submitted that the relief sought in the earlier writ application was for different purpose and, therefore, the present writ application being for a separate and different relief cannot be held to be either hit by the principle of res judicata or constructive res judicata much less to be not maintainable. In this regard, he has placed reliance not only on the judgment of the Apex Court in the case of *The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara*, but also on an observation made by the learned single Judge in the order dated 12.05.2010 in Civil Review No. 295 of 2008 filed by the petitioner after dismissal of the Special Leave Petition by the Apex Court.

5. This Court, having considered the materials on record, is of the view that the preliminary objection, raised by the learned counsel for the respondents, has to be upheld. In this regard, it has to be kept in mind that a consignment of the petitioner was subjected to seizure by the authorities of the Customs Department on 12.06.2001 and the Joint Commissioner of Customs in exercise of power under Section 122 of the Customs Act (hereinafter referred to as "the Act") had directed for confiscation of the seized goods under Section 111(b) of the Act wherein an option was given to the owner of the goods under Section 125 of the Act to redeem the seized goods on payment of redemption fine of Rs. 75,000/- in lieu of confiscation and such option was to be exercised only within one month of the date of order. The relevant portion of the aforesaid order of confiscation dated 15.07.2003 reads as follows:

"ORDER

Accordingly, in exercise of power conferred upon me under Section 122 of the Customs Act, 1962, I order for confiscation of the seized goods, under Section 111(b) of Customs Act, 1962, however I offer an option to the owner of the goods under Section 125 of Customs Act, 1962 to redeem the seized goods on payment of redemption fine of Rs. 75,000/- in lieu of confiscation. This option is to be exercised within one month of issue of the order. However, the release of goods to be done on payment of penalty amounts to the notice.

I order for confiscation of the seized truck under Section 115(2) of Customs Act, 1962. However, since the truck has been released provisionally on bond, on deposition of cash security of Rs. 25,000/-. I offer an option under Section 125 of Customs Act 1962 to redeem the seized truck on payment of redemption fine of Rs. 25,000/-.

I impose penalty, shown against the names mentioned below, under Section 112

of Customs Act, 1962.

Sd/- (P.K. Mishra) Joint Commissioner of Customs, Patna."

6. It is a matter of record that the petitioner as against the order dated 15.07.2003, had filed an appeal before the Commissioner of Customs and in that appeal, a prayer was made for waiver of the pre-deposit of penalty, as imposed by the original authority to the tune of Rs. 25,000/- against him. The Commissioner, in his interim order dated 21.09.2003, had, therefore, only passed an order as with regard to condoning the requirement of deposit of entire penalty of Rs. 25,000/- subject to payment of Rs. 5,000/- by the petitioner, which again would be very clear from the following extract of the aforementioned order dated 21.09.2003 of the appellate authority, relevant portion whereof reads as follows:

"2. Shri Radha Raman, Advocate appeared for personal hearing in the stay matter on 19-11-2003 on behalf of the appellant. Learned Advocate requested for condonation of delay of 12 days in filing appeal, as the delay had occurred due to flood in the village of appellant. He further stated that goods were purchased in and around raxaul and were being sent to Gorakhpur. Hence, act of smuggling is not proved. Any order of pre-deposit will cause hardship to the appellant. Hence, he requested for waiver of pre-deposit of penalty.

3. I have carefully considered the matter. In the circumstances of case delay caused in filling appeal is condoned and appeal is to be admitted on pre-deposit of penalty of Rs. 5,000/- (Rs. Five Thousand only) within 3 (three) weeks from date of this order and proof regarding compliance of this order must be produced on or before 31-12-2003 failing which appeal shall be dismissed without any further reference to them for non-compliance of provisions as contained in section 129E of the Customs Act, 1962.

Sd/- (A.K. Agarwal) Commissioner (Appeals) Customs & Central Excise Patna."

7. It however must be kept in mind that neither the petitioner had deposited the redemption amount of Rs. 75,000/- nor he had made any prayer before the appellate authority for extending the period of one month in which such redemption amount for redeeming the seized goods was offered to the petitioner under the order of the original authority dated 15.07.2003. Thus, when the petitioner himself did not exercise the option given by the original authority of redeeming the seized goods within a period of one month nor had he even filed an appeal within that period of one month i.e. on or before 14.08.2013, he could not have expected the customs authorities to sit idle. As a matter of fact, the appeal of the petitioner also ultimately was dismissed by order dated 21.09.2004, wherein the appellate authority had held as follows:

"6. I have carefully considered the same. The goods in question purported to be locally purchased or procured in and around Raxaul. However, no evidence, what so ever, has been produced or submitted in this regard. Moreover, it is observed

from perusal of case records that the covering transport document i.e. Invoice No. 4, dated 12-06-2001, which was found accompanying the entire consignment, was of only 9500 kg. whereas the actual weight of goods was found to be 17,500/- kg. and for the said huge difference, no palatable reasons have been given. Further, it is said that the said consignment was consigned to a party of Gorakhpur namely M/s. Naveen Traders, Gorakhpur but when the authorities concerned tried to ascertain the genuineness of the consignee, the letter sent on their address returned undelivered by the postal authorities. Had it been actually existed, the appellant ought to have produced him to prove his innocence. In the present case, the appellant neither could prove his bona fide from any corners nor came up with cogent reasons for licit possession and transportation or trading of goods in dispute. Moreover, it is well settled law that in quasi-criminal cases prima facie doubt is sufficient to shift the onus to the appellant. (AIR 1949 Madras 116 in Narasinga Muithu Chettiar). Since the appellant has failed to discharge the onus cast on him, I do not see any merit in the present appeal.

7. In view of foregoing, I do not find any reason to differ with the findings of the Adjudicating Authority. Accordingly, I reject the appeal of the appellant as devoid of merit.

Sd/- (I.P. Lal) Commissioner (Appeals) Customs & Central Excise Patna.

C No. S.5-172/2003-CAP/SZ (PAT)

dated :--

8. That, in fact, was not the end of the matter. The petitioner thereafter had filed an appeal before the Customs, Excise and Service Tax Appellate Tribunal, Kolkata being Appeal Nos. CSM-164/04, but the Tribunal also had dismissed the appeal of the petitioner for default on 02.06.2005. The said appeal of the petitioner, however, was subsequently restored, but again the same was dismissed for default by the tribunal by an order dated 06.01.06 by recording as follows:

"2) I find that when this case was posted on 2/1/06, 3/1/06, 4/1/06, 5/1/06 and today also none is present for the appellant. I dismiss the appeal for non-prosecution. Incidentally, I find that earlier this case was also dismissed for non-prosecution on 2/06/2005."

9. From the averments made in this writ application and the documents enclosed thereto, it will also become clear that the petitioner had again filed another application for restoration before the Tribunal, but such application for restoration was also dismissed by an order dated 10.03.2006, wherein it was held as follows:

"2. I observe that this is the second time that the matter is coming up for restoration of appeal. On an earlier occasion, this Tribunal had accepted the contention of the applicant and allowed the restoration. As it comes on a repeated manner, I do not find that there is any reason for restoring the appeal as sought for by the applicant. The Application is rejected."

10. What is still very significant to be noted here is that after the petitioner had lost up to the Tribunal, he had filed an application for redeeming the seized goods, in view of the order dated 15.07.2003, by filing an application before the Deputy Commissioner, Customs, Motihari on 15.05.2006, wherein it was stated that since the appeal of the petitioner had been rejected by the Tribunal on 10.03.2006, he had no other remedy but to deposit the amount of redemption and penalty and as such necessary order should be passed.

11. As a matter of fact, when the seized goods were not redeemed, the petitioner had filed a writ application in this Court being C.W.J.C. No. 12114 of 2006, wherein, apart from assailing the orders of the original authority, the appellate authority and the Tribunal, a specific prayer was made by the petitioner for issuance of a direction to the respondents to release the seized goods in his favour by accepting the redemption amounts of Rs. 75,000/- as also the penalty of Rs. 25,000/- in terms of the order of original authority dated 15.07.2003.

12. In the counter affidavit that was filed by the respondents, it has been stated that when the petitioner did not redeem the seized goods within the period prescribed of one month as directed in the order of the original authority dated 15.07.2003, and did not avail the offer in terms of Section 125 of the Act, those goods were auction sold.

13. At that stage, the petitioner had also assailed such auction in C.W.J.C No. 12114 of 2006 firstly on account of his(petitioner) being given no notice and secondly, on account of his consignment being undervalued by the authorities of Custom Department in auction sale, such submission of the petitioner however did not receive approval of the learned single Judge while dismissing the writ application by judgment and order dated 30.04.2007, wherein, it was held as follows:

"Petitioner"s case is that subsequently he wanted to pay redemption fine and penalty for release of the articles but it was refused as the seized goods have already been auction sold by the respondent authorities. Counsel for the petitioner submits that no notice was given to the petitioner before the auction sale of the seized articles. The articles which were seized valued at Rs. 3,50,000/- at the time of seizure were sold just for Rs. 402. It has also been stated that since the petitioner was pursuing his alternative remedy before the appropriate forum the respondents should not have auction sold till the date of final disposal of case.

On perusal of the provisions of the Customs Act I find that section 125 provides for redemption in view of confiscation. The petitioner was also given that opportunity and was directed to pay the redemption fee within one month. Petitioner"s appeal was dismissed in the year 2004 and he preferred revision which was dismissed for non prosecution in the month of January, 2005. Thereafter he again preferred revision which was finally dismissed. After the dismissal of the revision the articles seized vested with the Central Government

under Section 126 of the Customs Act. Petitioner lost his entitlement for retaining the seized articles after it vested in Central Government. The respondents thereafter auctioned sold articles and it cannot be said that they have committed any illegality or jurisdictional error. In this view of the matter petitioner cannot take a plea that the auction sale has been done by the respondents either in violation of rule of natural justice or in violation of any of the provisions of the Customs Act."

(underlining for emphasis)

14. Against the aforementioned order of the learned single Judge, the petitioner had filed an appeal, being L.P.A. No. 480 of 2007 which also was dismissed on 08.10.2007 and as against that order when the petitioner had moved the Apex Court, the Special Leave Petition was also dismissed on 21.03.2008. Thereafter, the petitioner is said to have filed a review application before the Division Bench seeking the review of the order passed in LPA No. 480 of 2007 which also was dismissed. It was only after that, the petitioner had filed the review application before the learned single Judge seeking review of the order dated 30.04.2007 in C.W.J.C. No. 12114 of 2006 which also was dismissed by an order dated 12.05.2010 wherein it was held as follows:

"Heard counsel for the petitioner and the Union of India.

The review application has been filed for reviewing the order dated 30.4.2007 passed in C.W.J.C. No. No. 12114 of 2006. I find that this application is not maintainable for the reason that against the order passed in the writ application petitioner has lost his case before the LPA Bench and also before the Apex Court. He had earlier filed a review application before the LPA Bench. That was also dismissed.

In this circumstance the review application is not maintainable. Secondly, I find that the point which is being raised by the petitioner by filing review application, was never raised in the writ application, so it cannot be said that any of the point raised by the petitioner was not considered and in this circumstance the order needs to be reviewed.

For the reasons stated in the application, this review application is dismissed.

Petitioner may seek his remedy before any other forum, if available."

15. The present writ application, in fact, has been filed after almost eight months of the aforesaid dismissal of the review application on the ground that only on 07.09.2010 the petitioner could get a copy of the release order of sale of consignment of the petitioner dated 04.08.2005 which according to him had given him new cause of action for the relief sought in this writ application.

16. This Court however fails to understand as to how the present writ application can be held to be maintainable specially when the finding of the learned single Judge as with regard to that very auction sale, whose quashing is being sought

herein, was approved in no uncertain terms by this Court in the order dated 30.04.2007 in C.W.J.C No. 12114 of 2006, wherein it was categorically held as follows:

"Petitioner lost his entitlement for retaining the seized articles after it vested in Central Government. The respondents thereafter auctioned seized articles and it cannot be said that they have committed any illegality or jurisdictional error. In this view of the matter petitioner cannot take a plea that the auction sale has been done by the respondents either in violation of rule of natural justice or in violation of any of the provisions of the Customs Act."

(underlining for emphasis)

17. Let it be noted that the aforesaid finding had already been also affirmed by the Division Bench in the Letters Patent Appeal, as well as by the Apex Court in the Special Leave Petition. This Court had again occasion to dismiss the review application filed by the petitioner against the order dated 08.10.2007 dismissing the LPA No. 480 of 2007. As a matter of fact, the order of the learned single Judge having merged with the order of the Division Bench in the order dated 08.10.2007 in LPA No. 480 of 2007, this writ application must be held to be barred by both the principles of res judicata and constructive res judicata.

18. By now also, it is well settled that the principles of res judicata is very well applicable to the proceedings under Article 226 of the Constitution of India. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of Daryao and Others Vs. The State of U.P. and Others, , wherein it was held that once the writ petition filed by a party under Article 226 is considered on the merits as a contested matter and is dismissed the decision thus pronounced would continue to bind the parties unless it is otherwise modified or reversed by appeal or other appropriate proceedings permissible under the Constitution.

19. The Apex Court, in this regard has also held that it would not be open to a party to ignore the said judgment and move this Court under Article 32 by an original petition made on the same facts and for obtaining the same or similar orders or writs. This principle was again reiterated in the case of Ashok Kumar alias Golu Vs. Union of India and others, , wherein it was held that it would not be open to the petitioner to reopen the challenge on the "specious plea" that a particular argument was not put forward before the Court.

20. The reliance placed by the petitioner on the judgment of the Apex Court in the case of The Amalgamated Coalfields Ltd. and Another Vs. The Janapada Sabha, Chhindwara, is altogether clearly distinguishable on facts where as would be apparent from reading of para-24, reads as follows:

"24. In the present appeals, the question which arises directly for our decision is: does the principle of constructive res judicata apply to petitions under Art. 32 or Art. 226 where the dispute raised is in respect of a year different from the year

involved in a prior dispute decided by this Court? We have already noticed the points actually decided by this Court against the appellants on the earlier occasion (vide *The Amalgamated Coalfields Ltd. and Others Vs. The Janapada Sabha, Chhindwara*, . One of the points sought to be raised was in regard to the validity of the increase in the rate of tax from 3 pies to 9 pies per ton; and since this point had not been taken in the petition and relevant material was not available on record, this Court refrained from expressing any opinion on it. The appellants contend that the order passed by this Court refusing permission to the appellants to raise this point on the earlier occasion does not mean that this Court has decided the point on the merits against the appellants; it may mean that the appellants were given liberty to raise this point later; but even otherwise, the point has not been considered and should not be held to be barred by constructive res judicata. It is significant that the attack against the validity of the notices in the present proceedings is based on grounds different and distinct from the grounds raised on the earlier occasion. It is not as if the same grounds which was urged on the earlier occasion is placed before the Court in another form. The grounds now urged are entirely distinct and so, the decision of the High Court can be upheld only if the principle of constructive res judicata can be said to apply to writ petitions filed under Art. 32 or Art. 226 . In our opinion, constructive res judicata which is a special and artificial form of res judicata enacted by S. 11 of the Civil Procedure Code should not generally be applied to writ petitions filed under Art. 32 or Art. 226 . We should be reluctant to apply this principle to the present appeals all the more because we are dealing with cases where the impugned tax liability is for different years. In dismissing the appellants' petitions on the ground of res judicata, the High Court has no doubt referred to Art. 141 under which the law declared by this Court is binding on all Courts within the territory of India. But when we are considering the question as to whether any law has been declared by this Court by implication, such implied declaration, though binding, must be held to be subject to revision by this Court on a proper occasion where the point in question is directly and expressly raised by any party before this Court. Therefore, we are inclined to hold that the appellants cannot be precluded from raising the new contentions on which their challenge against the validity of the notices is based."

(underlining for emphasis)

21. Thus, a bare reading of the judgment of the Apex Court in the case of *Amalgamated Coalfields (supra)*, will itself go to show that the Apex Court had entertained the plea because the tax liability was for a different year, other than for which the earlier decision was given by the Apex Court in the case of the same petitioner namely *Amalgamated Coalfields Ltd. v. Janapada Sabha, Chhindwara*. What would still make this judgment inapplicable, at least to the proceedings in the High Court, is that the Apex Court itself had held that the High Court was justified in dismissing the writ application of *Amalgamated Coalfields Ltd. (supra)* inasmuch as, it was held to be bound by the earlier judgment of the Apex Court but that was not binding on the Apex Court. Therefore, the underlined portion of

the aforementioned judgment, heavily relied by Mr. Mishra, would itself go to show that the same is more or less in exercise of power under Article 142 of the Constitution of India, which empowers the Apex Court to pass any order in the interest of justice but then such order under Article 142 of the Constitution of India cannot be used as a precedent. This is the subtle distinction between the power of the Apex Court under Article 141 of the Constitution of India and its special power under Article 142 of the Constitution of India.

22. This Court in fact would also find no applicability of the judgment of the Apex Court in the case of *Shilps Impex Vs. Union of India*, , inasmuch as, that was a case wherein the Apex Court had passed an interim order that once the petitioner had deposited the amount of duty, redemption and fine, he was entitled to get back the value of the goods which had disappeared from the possession of Custom Department.

23. The facts of the case of the petitioner however would not permit, learned counsel for the petitioner to raise even this plea. It has to be noted that the appeal of the petitioner was dismissed by the Tribunal on 02.06.2005, and no proceeding was pending on 04.08.2005, when the auction of the seized property of the petitioner was held. The restoration of the appeal in fact was allowed only subsequently sometime in the year 2006 and eventually the Tribunal had again dismissed the appeal of the petitioner on 06.01.2006. It is this factual aspect which will make this Court to hold that the observations made in the interim order of the Apex Court in the case of *SHILPS IMPEX*(supra), laying down infact no law cannot be made applicable. From the reading of the interim order in the case of *Shilps Index* (supra), it would become clear that in that case the amount of redemption was already paid by the authorities of the Customs Department, unlike in the present case, where the petitioner did not make payment of the amount of redemption as directed in the order of the original authority dated 15.07.2003.

24. As a matter of fact, it has to be restated, that in the case of redemption under the order of the original authority dated 15.07.2003, time for redemption was only a period of one month and that was also never extended by the appellate authority or the Tribunal and therefore, this court does not find that the action of the respondent in putting the seized goods of the petitioner on auction sale on 04.08.2005, on a date on which no proceeding before any authority or Tribunal was pending, can be said to be contrary to the provisions of Customs Act. As a matter of fact, the petitioner for the first time had offered to pay the redemption amount by filing an application on 15.05.2006, after its appeal was dismissed by the Tribunal on 06.01.2006 but, much that the goods were already auction sold by the department on 04.08.2005.

25. It is here that the principle of *res judicata* will directly come into play in the case of the petitioner inasmuch as, when the petitioner had raised this very issue of illegal auction of his seized property, this Court in the order dated 30.04.2007, had gone to hold that the auction sale done by the respondents was neither in

violation of the principles of natural justice nor in violation of the provisions of Customs Acts. Thus, when this finding of the learned Single Judge has become final on account of dismissal of his Letters Patent Appeal as also Special Leave Petition and further stand affirmed by dismissal of two review application both by the Division Bench and the learned Single Judge as discussed above, this Court sitting singly, cannot now allow the petitioner to re-open the whole thing, inasmuch as, that by itself would be against the settled principles of res judicata.

26. Yet another plea that notice was required to be issued to the petitioner before auction sale is also fully covered by the judgment of the learned single Judge wherein it had gone to hold that the auction cannot be held to be in violation of the principle of natural justice. If the petitioner wants to rely on a circular issued by the Ministry in this regard, which also has not been produced before this Court for showing that before auction of the property individual notice has to be given to the persons whose goods have been seized even such a plea will be now barred by the principles of constructive res judicata.

27. Reference in this connection may be usefully made to the judgment of the Apex Court in the case of State of U.P. Vs. Nawab Hussain, , wherein, explaining the principle of constructive res judicata, it was held as follows:

"The principle of res judicata come into play not only when the issue has been directly and explicitly decided by the Court but also when such issue has been implicitly and constructively decided. When any matter which might and ought to have been made a ground of defence or attack in an earlier proceeding but was not so made, then such matter in eyes of the law, to avoid multiplicity of litigation and to bring down of penalty under it, is deemed to have been constructively in issue and therefore is taken as decided."

28. Thus, for the reasons indicated above, this Court is not inclined to now allow the petitioner to re-agitate the same issue in a different manner specially when the seized goods in the year 2001 has already been disposed of by the auction sale in the year 2005 and the writ application, appeal, Special Leave Petition and two review applications one before the Division Bench and another before the learned single Judge of this Court, have been dismissed on the same issue.

29. This writ application is, accordingly, dismissed with a cost quantified at Rs. 10,000/- which must be deposited by the petitioner in the Patna High Court Legal Services Authority within a period of one month from today failing which the Collector of East Champaran District is directed to recover the said amount by initiating a certificate proceeding against the petitioner and deposit the same in the Legal Services Authority within a maximum period of six months from the date of receipt of a copy of this order.