

(2016) 09 DEL CK 0113

In the Delhi High Court

Case No : Writ Petition (C) No. 3821 of 2014.

Rosa Power Supply Co. Ltd. - Petitioner @HASH Union of India and Others

Date of Decision : 16-09-2016

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Section 114
Constitution of India, 1950 — Article 226

Citation : (2016) 9 ADDelhi 95 : (2016) 342 ELT 546

Hon'ble Judges : G. Rohini, CJ. and Rajiv Sahai Endlaw, J.

Bench : Division Bench

Advocate : Dr. A.M. Singhvi, Sr. Advocate with Mr. Sujit Ghosh, Mr. Shashank Shekhar, Mr. Nakul Mohta, Ms. Parul Shukla and Mr. Rishi Aggarwal, Advocates, for the Review Petitioner; Mr. Sanjay Jain, ASG with Mr. Dev P. Bhardwaj, CGSC and Mr. Vidur Mohan, Advocate, f

Final Decision : Disposed Off

Judgement

Rajiv Sahai Endlaw, J. - Review Petition No. 542/2014.

The petitioner filed this petition impugning the four orders, all dated 21st March, 2011 of the respondent no.3 Zonal Joint Director General of Foreign Trade, intimating to the petitioner the decision taken in the meeting of the Policy Interpretation Committee held on 15th March, 2011 under the Chairmanship of the Director General of Foreign Trade, of denying Deemed Export Benefits (DEB) "if the Bill of Entry is in the name of the project authority", as was in the case of the petitioner and accordingly denying the DEB to the petitioner. The petition also impugns the minutes of the said meeting dated 15th March, 2011 and seeks a direction to the respondents to give the DEB in the sum of Rs. 72 crores to the petitioner.

2. Arguments on the petition were heard on 21st July, 2014 and judgment reserved.

3. Vide detailed judgment dated 12th August, 2014, the petition was dismissed.

4. The petitioner seeks review, inter alia pleading that Special Leave to Appeal (C) No. 28644/2014 was preferred before the Supreme Court against our judgment dated 12th August, 2014 and which was disposed of as withdrawn on 7th November, 2014 with liberty to the petitioner to file review petition and with a request to this Court to consider the review petition in accordance with law and with the clarification that if the review petition fails, the petitioner will be at liberty to question not only the judgment dated 12th August, 2014 but also the order in the review petition.

5. Notice of the review petition was issued and a reply thereto filed and to which a rejoinder has been filed by the petitioner.

6. The senior counsel for the petitioner/review applicant was heard on 21st April, 2015 and 11th September, 2015.

7. CM No. 23810/2015 has been filed by M/s Simplex Infrastructures Ltd. for intervention in the review petition pleading that it has filed W.P.(C) No. 3200/2015 and W.P.(C) No. 3257/2015 in this Court making the same challenge as made in this petition and the hearing of which has been deferred till the disposal of this review petition filed by the petitioner and seeking intervention therein.

8. The senior counsel for the petitioner/review applicant and the learned Additional Solicitor General (ASG) appearing for the respondents were heard further on 22nd July, 2016 and order reserved.

9. We had vide our judgment dated 12th August, 2014, of which review is sought, dismissed the writ petition for the reasons (i) that the claim in the petition was in the nature of a monetary claim and the writ petition was not maintainable; (ii) that the limitation for a suit for recovery of amount illegally appropriated by the Government is governed by Article 62 of the Schedule to the Limitation Act, 1908 corresponding to Article 24 of the Limitation Act, 1963; (iii) that the claim of the petitioner was not of illegal recovery of tax or other monies by the Government but of denial by the Government of monetary benefit to which the petitioner claimed to be entitled; (iv) thus Article 113 of the Limitation Act, 1963 would apply and as per which the claim in the writ petition was barred by time; (v) that repeated representations made by the petitioner and rejection thereof neither extends the period of limitation nor is a satisfactory explanation for delay; (vi) that the petitioner was satisfied with the rejection of its claim and cannot be permitted to revive a stale claim merely because someone else similarly situated had succeeded; and, (vii) that normally a petition under Article 226 of the Constitution of India will not be entertained to enforce a civil liability and no exceptional ground had been made out by the petitioner.

10. The emphasis of the senior counsel for the petitioner/review applicant has been that there is an error apparent on the face of the judgment dated 12th August, 2014 in as much as though in para 1 of the judgment it has been noted that the petition also impugns the minutes of the meeting dated 15th March,

2011 but in para 11 of the judgment it has been observed that "it is not the case of the petitioner that the decision dated 15th March, 2011 was by an authority which was not competent to take the decision". It is argued that in fact it was the plea of the petitioner in the petition that the decision dated 15th March, 2011 was not of a competent authority.

11. In support of the aforesaid contention, the senior counsel for the petitioner/review applicant has taken us through the pleadings in the petition and the review petition and the reply thereto; Section 16 of The Foreign Trade (Development and Regulation) Act, 1992; the judgment dated 26th February, 2014 of the Division Bench of this Court in W.P.(C) No. 4455/2013 titled Simplex Infrastructure Ltd. v. Union of India and encouraged whereby the petitioner had filed this petition.

12. On the aspect of delay, the senior counsel for the petitioner/review applicant contended that the petitioner had preferred this petition in May, 2014, soon after the judgment dated 26th February, 2014 and thus there was no delay.

13. It was further argued that once another person similarly placed as the petitioner namely Simplex Infrastructure Ltd. had succeeded, the claim of the petitioner could not have been barred by delay in laches. Reliance was placed on para 16 of *Rajender Singh v. Lt. Governor, Andaman & Nicobar Islands*, (2005) 13 SCC 289 laying down that the power of review extends to correct all errors to prevent miscarriage of justice and it was argued that there would be miscarriage of justice, in Simplex Infrastructure Ltd. succeeding and the petitioner failing, qua the same claim.

14. Error was also sought to be found in the reasoning in the judgment under review as to the maintainability of the petition by referring to para 25 of *ABL International Ltd. v. Export Credit Guarantee Corporation of India Ltd.* (2004) 3 SCC 553.

15. Reliance was also placed on paras 15 and 16 of *Competent Authority v. Barangore Jute Factory*, (2005) 13 SCC 477 to contend that non-consideration of material on record is a ground for review.

16. Reference was also made to *Bharat Heavy Electricals Ltd. v. Union of India*, 2015 (316) ELT 466 (Cal.) where a Single Judge of the High Court of Calcutta also set aside the decision *supra* dated 15th March, 2011 and consequently held that the petitioner therein would not be required to pay back the DEB already received.

17. Per contra, the learned ASG contended that the argument of the petitioner/review applicant, of the competence of the authority which had taken the decision dated 15th March, 2011 is irrelevant as the reason which prevailed in the judgment of which review is sought was that the monetary claim in the writ petition was barred by time. Without prejudice thereto, it is also argued that the petitioner itself had submitted to the jurisdiction of the authority which took the

decision dated 15th March, 2011 and never challenged its jurisdiction. Further without prejudice, it is argued that the challenge to the competence of the authority is misconceived.

18. The learned ASG further argued that the claim of the petitioner in the petition was based entirely on the judgment dated 26th February, 2014 *supra* in the writ petition filed by Simplex Infrastructure Ltd. and that cannot be a cause of action for the petitioner. It is argued that a judgment in one case cannot be a cause of action for another case.

19. The learned ASG has even otherwise, on merits also argued that DEB is only for goods manufactured in India but the subject goods were not manufacture in India.

20. It was also contended by the learned ASG that ABL International Ltd. *supra* has been differentiated in *Joshi Technologies International Inc. v. Union of India*, (2015) 7 SCC 728.

21. The senior counsel for the petitioner/review applicant in rejoinder has again drawn attention to para 11 of the judgment of which review is sought and argued that it flows therefrom that had we understood the case of the petitioner as constituting a challenge to the competence of the authority which took the decision dated 15th March, 2011 and which has now been argued, our judgment would have been otherwise. Attention is invited to the judgment dated 13th February, 2014 of the Division Bench of the High Court of Gujarat in Special Civil Appeal No. 11031/2013 titled *Alstom India Ltd. v. Union of India* holding that even after making payment of tax either by misinterpreting the statutory provision or under unconstitutional provision or under mistake of law, a citizen can challenge the inherent lack of jurisdiction and if succeeds, the Court can in appropriate case direct refund of the amount which has been collected without jurisdiction. Reliance is also placed on para 8 of *Sushil Kumar Sen v. State of Bihar*, (1975) 1 SCC 774 to contend that qua an action for recovery of payment made under mistake, there can be no plea of laches or delay.

22. Both counsels also relied on *Salonah Tea Company Ltd. v. Superintendent of Taxes, Nowgong*, (1988) 1 SCC 401 (para 20).

23. No arguments were addressed by the counsel for M/s Simplex Infrastructures Ltd.

24. We cannot be unmindful of the fact that we have on an earlier occasion, after hearing the counsels and reserving the judgment, not found the petitioner entitled to the relief. We have wondered, whether our judicial system permits the Courts/Judges to so change their minds/opinions, when approached in review.

25. In our view, to widen the scope of the review to the extent desired by the senior counsel for the petitioner/review applicant, may have far reaching ramifications affecting the justice delivery system.

26. Though we, in the facts of the present case, even after hearing a different counsel now appearing for the petitioner/review applicant, do not find any case to take a different view from what we had taken earlier, but it is well-nigh possible that the same judge, at another point of time far removed from when he/she had earlier heard and decided the lis, may be inclined to take a different view. After all we, as Judges, are continuously evolving and our beliefs and opinions are changing with each day's experience and judgments read by us and cited before us. In spite of our best efforts, due to repeated adjournments sought, the review petition has remained pending for nearly one and a half years. However if it were to be held that we today are entitled to form a different opinion than what we had formed earlier, the same in our view is coupled with the danger of eroding the faith in the judicial system and the consumers of the judicial system believing that the Judges can be prevailed upon to so change their opinion/judgments.

27. The power of review, in the Code of Civil Procedure, 1908 (CPC), is confined to cases of discovery of new and important matter or evidence which after exercise of due diligence could not be placed by the parties before the Court at the time of hearing or on account of some mistake or error apparent on the face of the record.

28. The present case does not fall within the aforesaid limitation. We are on the basis of the arguments of the senior counsel for the petitioner/review applicant unable to find any such error apparent on the face of the record.

29. Every one of the arguments now presented before us has been already considered carefully in the judgment of which review is sought and the petitioner's demand for review is only an attempt to retrieve a lost case. No fresh facts are brought to our notice by way of discovery of new and important evidence, which would justify reconsideration of the judgment. Para 11 of the judgment of which review is sought and to which repeated reference was made by senior counsel for petitioner/review applicant, in our view, instead of forming a ground for review, shows that we have considered the said contention also and decided against the petitioner thereon also. In this circumstance, if we are to now reach a different conclusion than was reached earlier, the same in our view will put the credibility of the judicial system and this court at stake.

30. Supreme Court, in *Haridas Das v. Smt. Usha Rani Banik*, (2006) 4 SCC 78 reiterated in *S.N.S. (Minerals) Ltd. v. Union of India*, (2007) 12 SCC 132 held that the parameters of review are prescribed in Order 47 of the CPC and permit for a rehearing "on account of some mistake or error apparent on the face of the records or for any other sufficient reason" the former part of the rule deals with a situation attributable to the applicant and the latter to a jural action which is manifestly incorrect or on which two conclusions are not possible; neither of them postulate a rehearing of the dispute because a party had not highlighted all the aspects of the case or could perhaps have argued them more forcefully and/or cited binding precedents to the Court and thereby enjoyed a favourable

verdict. It was further held that where the order in question is appealable, the aggrieved party has adequate and efficacious remedy and the Court should exercise the power to review its order with the greatest circumspection. The same is the position here. The petitioner, this time around represented by an eminent counsel, who has argued with all eloquence at his command and with reference to a host of judgments, cannot expect a different verdict.

31. Reference may also be made to M/s. Thungabhadra Industries Ltd. v. Government of Andhra Pradesh, AIR 1964 1372 also reiterated in S.N.S. (Minerals) Ltd (supra) laying down that there is a distinction which is real, though it might not always be capable of exposition, between a mere erroneous decision and a decision which could be characterised as vitiated by "error apparent". Review was held to be no means an appeal in disguise whereof an erroneous decision is reheard and corrected but lies only for patent error, where without any elaborate argument one could point to the error and say there is a substantial point of law which stares one in the face, and there could reasonably be no two opinions entertained about it - only then a clear case of error apparent on the face of the record would be made out.

32. The present case by no stretch of imagination falls in the category aforesaid. The petitioner here seeks review not on the ground of discovery of new and important matter or evidence which, after the after the exercise of due diligence was not within the knowledge of the petitioner or could not be produced by the petitioner at the time when the judgment was passed but wants a review on the ground that the decision is erroneous. This was held to be not permissible also in Meera Bhanja v. Nirmala Kumari Choudhury, (1995) 1 SCC 170 and in the State of West Bengal v. Kamal Sengupta, (2008) 8 SCC 612.

33. We have also considered whether in the light of the order dated 7th November, 2014 of the Supreme Court in Special Leave to Appeal (C) No. 28644/2014 supra, we are required to consider the matter afresh.

34. A perusal of the said order shows that the counsel for the petitioner at the outset only sought permission to withdraw the Special Leave Petition with liberty to file review petition and which permission was granted. The fact that the petitioner was also granted liberty to, if remaining aggrieved, again question the judgment dated 7th November, 2014, does not according to us entitle the petitioner/review applicant to a wider consideration before us than is permissible in review jurisdiction.

35. We therefore do not find any ground for review.

36. CM.No. 23810/2015 by M/s Simplex Infrastructures Ltd. is also misconceived.

37. Dismissed.