

Before Ajay Tewari, J.

**PUNJAB STATE INDUSTRIAL DEVELOPMENT
CORPORATION LTD.,—Petitioner**

versus

**THE APPELLATE AUTHORITY FOR INDUSTRIAL AND
FINANCIAL RECONSTRUCTION AND OTHERS,—
Respondents**

C.W.P. No. 3869 of 1997

13th August, 2008

Constitution of India, 1950—Art. 226—State Financial Corporations Act, 1951—S. 29—Code of Civil Procedure, 1908—S.11—Res judicata—High Court dismissing petition challenging order of Board of Industrial and Financial Reconstruction (BIFR) holding reference sought by respondent No. 5 not maintainable—Appellate Authority (AAIFR) allowing appeal of respondent No. 5—Whether order by High Court would operate as res judicata in subsequently decided appeal—Held, yes—No other Court or authority could take a contrary view in face of decision of High Court.

Held, that the High Court held on merits that the reference sought by the respondent No. 5 before the BIFR was not maintainable. In the face of that decision no other Court or authority could take a contrary view of the matter. The counsel for respondent No. 5 has urged that the prayer made in the previous writ Petition No. 8946 of 1996 was a very limited prayer and, in fact, this Court had no occasion to deal with the question of maintainability of reference. I am afraid this argument can be of little avail. The finding of Division Bench of this Court is binding. It was open to respondent No. 5 to have got the said finding corrected in appropriate proceedings but either the AAIFR could set it aside and nor can it be set aside during the hearing of this petition.

(Para 10 & 13)

Arun Walia, Advocate *for the petitioner.*

M.S. Bedi, Advocate *for respondent No. 4.*

Ashwani Talwar, Advocate *for respondent No. 5.*

Rahul Sharma, Advocate *for respondent No. 6.*

Parshant Batish, Advocate for D.V. Sharma, Advocate *for respondent No. 7.*

AJAY TEWARI, J.

(1) This petition has been filed by the Punjab State Industrial Development Corporation (for short PSIDC) challenging the order dated 24th September, 1996, whereby the Appellate Authority for Industrial and Financial Reconstruction (for short AAIFR) has allowed the appeal of respondent No. 5 against an order dated 13th March, 1996 passed by the Board of Industrial and Financial Reconstruction (BIFR) dated 13th March, 1996 holding that the reference preferred by respondent No. 5 was not maintainable.

(2) The case set up by the petitioner is that after the aforementioned order dated 13th March, 1996, the respondent No. 5 had filed CWP No. 8496 of 1996 for the following reliefs :—

- (a) Quash the Advertisement of sale Annexure P-1,
- (b) To open the locks put on the unit of Punjab Nitrates Ltd. and to restrain the respondents from interfering in the functioning of the company in any way till pendency of reference/appeal before AIFR under Section 25 of SICA,
- (c) To exempt the necessity of filing certified copies of the Annexure.
- (d) To award the costs of the petition

(3) In the said case a Division Bench of this Court noticed as follows :—

“It is so pleaded and argued by the learned counsel representing the petitioner and it may be mentioned that it is his sole

contention that after the matter was referred to BIFR, respondents herein were legally debarred from taking any action including the one contemplated by them i.e. sale of the unit which has been endeavoured to be done by issuing advertisement Annexure P-1.”

(4) Ultimately this Court held as follows :—

“It has been specifically pleaded that reference before the BIFR was filed on 20th October, 1995 a month after the possession of the assets of the company was taken over by the Corporation. With a view to support this assertion made in the written statement Mr. Sethi, learned Counsel representing respondent No. 1 has taken us through order Annexure R-2 passed by BIFR, paragraph 10 whereof reads as under :—

“Reacting to the submissions of Shri Jagdish Gupta, company’s representative pointed out certain factual inaccuracies therein. He submitted that they had filed a reference with BIFR on 27th September, 1995 and in the month of October, 1995 certain additional information was submitted.”

No replication has been filed to controvert the plea of the Financial Corporation with regard to date of filing reference with BIFR. That apart, it has been the company’s case before the BIFR that reference was filed on 27th September, 1995. It was not disputed during the course of arguments that by applying Section 29 of the Financial Corporation Act, possession of the unit was taken on 20th September, 1995.”

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A bar created under Section 21(1) of the 1985 Act cannot be invoked whatever be the stage and we are of the clear view that if action is taken prior to making

of a reference, Section 22(1) of the Act cannot be pressed into service. We are also in agreement with the contention raised by the learned counsel representing the respondents that the petitioner who was removed by the company to be the Managing Director could not maintain writ in his individual capacity.”

(5) Consequently this Court dismissed the writ petition by order dated 2nd August, 1996.

(6) Before the filing of the said writ petition No. 8946 of 1996 respondent No. 5 had also preferred an appeal against the aforesaid order dated 13th March, 1996. It was this appeal which has been allowed by the impugned order wherein it has been held on fact that the reference was sought by the respondent No. 5 before the action under Section 29 of the State Financial Corporations Act, 1951 could be initiated by the petitioner and thus the finding of the BIFR that the action under Section 29 was prior to the seeking of reference was incorrect.

(7) The question which has been raised by the counsel for the petitioner is that once a Division Bench of this Court had given a finding whether right or wrong—that the reference was sought by the respondent No. 5 after the action had been initiated under Section 29 by the petitioner, the said finding would operate as *res judicata* in the subsequently decided appeal. It is further argued by the counsel for the petitioner that the only course open to the respondent No. 5 would have been to challenge the order of this Court in appropriate proceedings, but the findings recorded by this Court could not be set at naught by the AAIFR.

(8) Learned counsel for the respondent has not disputed the fact that this Court had given a positive finding regarding the maintainability of the reference sought by the respondent No. 5. However, he submits that within a period of 46 days of the order of this Court the appeal filed by the said respondent came to be allowed and it was for this reason that no appeal against the order of this Court was required to be filed. He has further argued that after the passing of the impugned

order and in pursuance thereto the entire matter was, in fact, remanded to the BIFR and that on 10th March, 1997 the petitioner appeared before the Board when the Board recorded its satisfaction to take the measures specified under Section 18 of the Act in relation to the company. He further states that having participated in the said proceedings the petitioner is estopped from challenging the same. In any case he adds that the petitioner has not disclosed to this Court about the passing of the aforesaid order dated 10th March, 1997 and is thus guilty of concealment. He further states that by the passing of the order dated 10th March, 1997 the impugned order stood implemented and, therefore, this writ petition is not maintainable.

(9) In my opinion this petition must succeed. Before proceeding further it would be profitable to reproduce Section 11 of the C.P.C. which is as under :—

“Res judicata.—No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

Explanation I.—The expression ‘former suit’ shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II.—For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court.

Explanation III.—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV.—Any matter which might and ought to have been made ground defence or attach in such former suit

shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V.—Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI.—Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

Explanation VII.—The provisions of this section shall apply to a proceeding for the execution of a decree and references in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII.—An issue heard and finally decided by a court of limited jurisdiction, competent to decide such issue, shall operate as *res judicata* in a subsequent suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.]”

(10) Apropos the above, facts revealed in this case are that the Division Bench of this Court had categorically held on merits that the reference sought by the respondent No. 5 before the BIFR was not maintainable. In the face of that decision no other Court or authority could take a contrary view of the matter. Reference may be made in this regard to **The Workmen of Cochin Trust versus The Board of Trustees of the Cochin Port Trust and another (1)**, wherein their Lordships of the Supreme Court held as under :—

“It is well-known that the doctrine of *res judicata* is codified in S. 11 of Code of Civil Procedure but it is not exhaustive.

(1) AIR 1978 S.C. 1283

Section 11 generally comes into play in relation to civil suits. But apart from the codified law the doctrine of *res judicata* or the principle of *res judicata* has been applied since long in various other kinds of proceedings and situations by Courts in England, India and other countries. The rule of constructive *res judicata* is engrafted in Explanation IV of S. 11 of the Code of Civil Procedure and in many other situations also principles not only of direct *res judicata* but of constructive *res judicata* are also applied. If by any judgment or order any matter in issue has been directly and explicitly decided the decision operate as *res judicata* and bars the trial of an identical issue in a subsequent proceeding, between the same parties. The principle of *res judicata* also comes into play when by the judgment and order a decision of a particular issue is implicit in it, that is, it must be deemed to have been necessarily decided by implication ; then also the principle of *res judicata* on that issue is directly applicable. When any matter which might and ought to have been made a ground of defence or attack in a former proceeding but was not so made, then such a matter in the eye of law, to avoid multiplicity of litigation and to bring about finality in it is deemed to have been constructively in issue and, therefore, is taken as decided.”

(11) The second judgment on the point is **Teja Singh versus The Union Territory of Chandigarh and others (2)**, wherein a Division Bench of this Court held as follows :—

“Thus it is quite evident that the principles of *res judicata* are attracted only when a writ petition is dismissed after contest by passing a speaking order as in that event the decision would operate as *res judicata* in any other proceeding such as suit or a petition under Article 32 etc.”

(12) Apart from this learned counsel for the petitioner has brought to my notice order passed by a Division Bench of this Court

in an earlier case filed by the respondent No. 5 bearing **CWP No. 20186 of 2006** titled as **Bal Krishan Gupta versus Punjab Financial Corporation and others**, wherein this Court held as follows :—

“Petitioner is in the habit of filing writ petitions in this Court. One such writ petition CWP No. 1838 of 2002, filed by the petitioner camp up for hearing before this Court on February 4, 2002 and the following order was passed :—

“This is a petition for issuance of a writ of Certiorari quashing the sale of unit of the petitioner pursuant to advertisement Annexure P-1.

After arguing the case for some time, Shri Arun Bansal requested that his client may be allowed to withdraw the writ petition with liberty to avail other remedies.

The request of the learned counsel is accepted and the writ petition is dismissed as withdrawn with liberty in terms of the prayer made.”

Thereafter, the petitioner kept mum and did nothing to agitate his rights. He did not initiate any proceedings against the respondent Corporation to show that he was not under an obligation to pay the amount in dispute. Now, when again, mortgaged property in Possession of respondent No. 1 has been notified for sale, he has filed this writ petition on these very grounds, which he had agitated in CWP No. 1838 of 2002. Counsel for the petitioner has failed to convince us as to on what ground interference can be made and the respondent corporation can be restrained from selling the property in dispute, which is in their possession for the last more than ten years.

Numbers of attempts to delay the proceedings seem to have been made. Dismissed.”

(13) This is an additional ground to hold against the petitioner. The Counsel for respondent No. 5 has urged that the prayer made in the previous writ petition No. 8946 of 1996 was a very limited prayer and; in fact, this Court had no occasion to deal with the question of maintainability of reference. I am afraid this argument can be of little avail. The finding of Division Bench of this Court is binding upon me. It was open to the respondent No. 5 to have got the said finding corrected in appropriate proceedings but neither the AAIFR could set it aside and nor can it be set aside during the hearing of this petition.

(14) In this view of the matter, this writ petition is allowed, however, with no order as to costs.

R.N.R.

Before K.C. Puri, J.

**KAMLA WATI (DECEASED) THROUGH HER
L.RS.,—Defendant No. 2/Appellant**

versus

CHAMAN LAL AND ANOTHER,—Plaintiff/Respondents

R.S.A. No. 3888 of 1999

23rd January, 2008

Code of Civil Procedure, 1908—Execution of gift deed by owner of suit property in favour of defendant No. 1—Defendant No. 1 selling property to defendant No. 2/appellant—Plaintiff claiming separate possession ½ share of suit property by partition—Courts below interpreting execution of gift deed to extent of ½ share in favour of defendant No. 1 finding that defendant has not specifically denied execution of gift deed to extent to ½ share—Gift deed showing that original owner had gifted his entire property and not half share—Mutation of sale deed already reflected in revenue record and defendant No. 1 or defendant No. 2 has been recorded as owner of whole of property for last 27/28 years—Plaintiff raising no objection at time of execution of sale deed in