CUSTOMS, EXCISE & SERVICE TAX APPELLATE TRIBUNAL
<u>ALLAHABAD</u>

REGIONAL BENCH - COURT NO.I

Service Tax Appeal No.504 of 2012

(Arising out of Order-in-Appeal No.191/ST/ALLD/2011 dated 19/12/2011 passed by Commissioner (Appeals) Central Excise & Service Tax, Allahabad)

M/s Sagar Road Lines, **.....Appellant**
(Murdhawa, Renukoot, Sonebhadra)

VERSUS

Commissioner of Central Excise, Allahabad ....Respondent

(38-M.G. Marg, Civil Lines, Allahabad)

<u>APPEARANCE:</u>

Shri Atul Gupta, Advocate for the Appellant
Shri Santosh Kumar, Authorised Representative for the Respondent

CORAM: HON'BLE MR. P.K. CHOUDHARY, MEMBER (JUDICIAL)
HON'BLE MR. SANJIV SRIVASTAVA, MEMBER (TECHNICAL)

FINAL ORDER NO.70188/2024

DATE OF HEARING : 31 January, 2024
DATE OF PRONOUNCEMENT : 22 April, 2024

<u>SANJIV SRIVASTAVA:</u>

This appeal is directed against the order in appeal No 191/ST/ALLD/2011 dated 19.11.2011 of the Commissioner (Appeal) Central Excise and Service tax Allahabad. By the impugned order Commissioner (Appeal) has dismissed the appeal filed by the appellant against order in original No (ST-214/2010) 81 of 2011 dated 14.06.2011 of the Joint Commissioner Central Excise Allahabad holding as follows:

"ORDER

1. *I hereby confirm the demand of Rs. 12,88,132/- (Service tax Rs 11,56,872/- + Education Cess Rs 25,137/- + Secondary & Higher Education Cess Rs 6123/-) as service tax under the provision of section 73(2) of the Finance Act,*

1994 against the party alongwith interest under the provisions of section 75 of the Finance act, 1994 as amended from time to time. This amount is held to be recoverable from the party.

2. *I do not impose any penalty by invoking Section 80 of the Finance Act, 1994."*

2.1 Appellant is registered with the department and is engaged in providing taxable services under the category of Manpower Recruitment Agency, Cargo Handling Services, Maintenance & Repair Service, Construction Services in respect of Commercial or Industrial Buildings and Civil structures, Site Preparation and Clearance, Cleaning Services.

2.2 It was gathered from M/s Hindalco Industries Ltd. Renukoot, Sonebhadra, that in respect of various services received by them from various service providers including appellant, they have made the payments to the service providers during the period 2005-06 to 2009-10.

2.3 On the basis of the information received revenue was of the view that appellant had not paid the service tax, amounting to Rs 12,88,132/- (including cess) during the said period, by suppressing the value of taxable service provided by them.

2.4 A Show Cause Notice dated 22.10.2010 was issued to the appellant asking them to show as to why:-

1. *The service tax amounting to Rs. 12,88,132/- (Service Tax Rs. 11,56,872/- + Education Cess Rs. 25,137/-+ Secondary & Higher Education Cess Rs. 6,123/-) should not be demanded and recovered from them alongwith appropriate Interest under the proviso to Section 73(1) of the Act r/w Section 75 of the Act.*
2. *Penalty should not be imposed upon them under the erstwhile Section 75A read with Section 77 of the Act for violation of Section 69 of the Act/rule 4 of the Rules.*
3. *Penalty should not be imposed upon them under Section 77 of the Act for violation of Section 70 read with rule 7 of the Rules, in case of each default*

4. Penalty should not be imposed upon them under section 76 of the Act for violation Section 68 of the Act read with Rule 6 of the Rules.

5. Penalty should not be imposed upon them under Section 78 of the Act.

2.5 The show cause notice was adjudicated as per the order in original referred in para 1 above. Appeal filed by the appellant before the first appellate authority has been dismissed as per the impugned order.

2.6 Aggrieved appellant have filed this appeal.

3.1 We have heard Shri Atul Gupta, Advocate for the appellant and Shri Manish Raj, Authorized Representative for the revenue.

3.2 Arguing for the appellant learned counsel submits that:

- Show cause notice is vague.
- Quantification of the demand as per the orders of the lower authorities is incorrect.
- Extended period cannot be invoked.
- Demand is revenue neutral
- No interest or penalty could be levied.

3.3 Arguing for the revenue learned authorized representative re-iterates the findings recorded in the impugned order.

4.1 We have considered the impugned order along with the submissions made in appeal and during the course of arguments.

4.2 We find that that demand has been confirmed by the authorities below, for the reason that the appellant had accepted their liability for payment of service tax, and they had disputed the demand only on the account of quantification, in esepect of which both the authorities have concluded that the appellant had failed to substantiate their claim by producing the relevant records for verification.

4.3 Impugned order records as follows while dismissing the appeal:

"4 Opportunity of personal hearing was afforded to the appellant but neither he turned up nor made any request for adjournment. From the respondent department, neither anybody appeared on the date of hearing nor filed cross objection to the appeal. Therefore, I proceed to dispose off the appeal on the basis of available records.

5. I have carefully gone through the case records. The department has alleged that the appellant suppressed the gross value taxable services provided to M/S Hindalco Ind. Ltd resulting in short payment of service tax amounting to Rs. 12,88,132/-. The thrust of the appeal is that (i) the alleged services was made effective from 16.06.2005 therefore, prior to its insertion the value was not includible in gross value and in case of Tangible Goods supply service, the gross value from 01.04.2005 to 15.05.2008 should be excluded and ***(ii) The figures informed by M/s Hindalco was inclusive of service tax amounting to Rs 12,88,132/- which should be excluded from the gross turnover****.*

6. From the perusal of records, I find that the issue was taken up by the adjudicating authority and he referred the matter to the officers of concerned Division. The facts in this regard are evident from the following observation made by the adjudicating authority

> *"To enquire the correctness of the chart submitted by the party the matter was referred to the concerned Division. However the concerned party has not provided the relevant record to the division or Range staff for verification. Since the supporting documents were neither submitted to the adjudicating authority nor provided to the division/Range staff, the chart submitted by the party can't be accepted. Further, the chart provided by the party is also not proper as per valuation aspect."*

I find that the appellants have neither contested nor controverted the aforesaid finding. It is also evident from *the records that the appellants have not furnished any detail in any manner along with the present appeal in confirmation of their contention. In view of above, I find no strength in the contention of the appellants*

7. I have gone through the facts of the case and the material available on record as also the submissions of the appellants with reference to the impugned Order-in-Original dated 14.06.2011. It is an admitted fact that the appellants did not contest the Show Cause Notice dated 22.10.2010 on merits. There is no dispute regarding providing of services and receipt of value of taxable service. The relief regarding penalty has already been giver to the appellants in the Order-in-Original and the department has generously waived all the penalties under Section 80 of the Finance Act, 1994. The appellants are apparently aggrieved on account of the fact that for arriving at the assessable value for determination or service tax, the component of service tax has not been deducted from the gross value of taxable services received by them from the service recipients for providing the service in question. It is however not at all clear from the submissions of the appellants as also from the records of the case available on file if the gross value or amounts received by the service provider did or did not include service tax. Nor is it manifest from anything submitted by the appellants that the nonpayment of service tax was on account of non inclusion of service tax in the total receipts from the service recipient. It appears that the request for exclusion of service tax component from the gross receipts is a clever device of the appellants to reduce their tax liability. In terms of Section 67 (2) of the Finance Act, 1994, the component of service tax shall get excluded only and only if the gross amount charged by the service provider is inclusive of service tax payable. Nothing whatsoever has been furnished by the appellants to substantiate and establish that they had charged service tax *from the service receiver and yet the same was not paid. The appellant have, therefore, no case on this account."*

4.4 Order in Original records as follows for confirming the demand made in the show cause notice:

"I find from the totality of circumstances that the party is a contractor of M/s Hindalco Industries Ltd., Renukoot, Sonebhadra. The party had provided the service to M/s Hindalco. The party has submitted in their defence reply that they are ready to deposit the service tax, due as per the chart for calculation of tax submitted with the reply. Further, they have requested that being ready to pay the tax and being innocent penalty may please be dropped.

I have gone through the records of the case as well as submissions of the party. The party is not contesting that they were engaged in providing the Taxable services as discussed in the show cause notice. They disputed only on the quantification aspect, as they have submitted a different chart regarding value of the taxable liability.

To enquire the correctness of the chart submitted by the party the matter was referred to the concerned Division. However the concerned party has not provided the relevant record to the division or Range staff for verification. Since the supporting documents were neither submitted to the Adjudicating Authority nor provided to the division /Range staff, the chart submitted by the party can't be accepted .Further the chart provided by the party is also not proper as per valuation aspect.

I also take note of the charges of non-payment/short payment which have not been rebutted by the party. It is also a fact that the party failed to discharge the statutory burden of declaring the value of taxable service to the department which amounts to suppression of facts and provision of extended period is invokable in this case.

Thus I find that the demand as proposed in the Show Cause Notice is liable to be confirmed.

It has also been observed that more than 200 such show cause notices have been issued by the division and Commissionerate Allahabad. It indicates that there is mass unawareness amongst the service provider of that area. It is also obvious that the party is ready to deposit the due service Tax. In my perception Service Tax was not deposited due to unawareness only, which may be taken as reasonable cause for failure of deposit of the Service Tax.

Therefore, I am not inclined to impose any penalty as proposed in he Show Cause Notice by invoking Section 80 of the Finance Act, 1994.

There is plethora of cases where the penalty has been waived on the basis of ignorance of the party.

In case of Magnum International ys. Commissioner of Customs & Central Excise Bhopal (Final order No ST/57-58/2008-PB, dated 03-04-2008) on the one hand invocation of extended period was justified covering the extended period demand , and on the other hand penalty was waived on the basis of reasonable cause for failure to discharge the Tax liability.

It has been observed by the Hon'ble CESTAT in the case of CCE vs. Busy Bee (2009) 18 STT 18 392 (CESTAT) that if nonpayment was due to ignorance of law, penalty is not imposable."

4.5 At the time of personal hearing before the original authority while admitting his liability to pay the service tax, appellant had submitted the calculation chart as follow, seeking re-quantification of demand. Appellant submitted that the they are ready to pay the service tax due on the basis of quantification given by them.

Summary of calculation for tax liability of M/s Sagar Road Lines, Muurdhawa, Renukoot, Sonebhadra		
Details	Amount	Amount

Gross Turnover as per SCN		1,16,40,263.00
Less PF included in gross turnover	3,76,464.00	
Less Threshold Exemption of Rs 4 lacs	4,00,000.00	
Less service prior to 16.06.2005	84,17,327.67	
Less service tax paid by M/s Hindalco	11,353.82	92,05,145.49
Net taxable turnover		24,35117.51
Service Tax		2,50,817.10
Less service tax already paid as per SCN		0
Less paid on 18.09.2010 for period Jan & Feb 2010		20,404.00
Net tax payable		2,30,413.10

4.6 Adjudicating authority sought for the verification of the calculation chart submitted by the appellant. However as no verification report was received by him he proceeded to adjudicate the matter, rejecting the calculation chart submitted by the appellant. In his appeal before the Commissioner (Appeal), appellant has specifically stated as follows:

"11. That it has been alleged that the appellant failed to provide record for verification through divisional office which is incorrect. The chart submitted by the appellant showing the calculation of service atx liability was verified by the department from the service recipient i.e. M/s Hindalco Industries Limited. The departmental representative verified the chart and all necessary details from the records of service recipient. After verification sample copy of invoices also were submitted by M/s Hindalco Industries Limited to departmental representative vide its letter dated 09.06.2011 in compliance to department's letter no 855 dated 30.05.2011 asking M/s Hinadalco Industries Limited to get the records verified.

12. The appellant vide letter dated 05.05.2011 represented its case before the office of Commissioner of Central Excise and Service Tax contending SCN mainly on the following grounds

a) *The gross turnover shown in SCN includes PF and Bonus which should be excluded as separate notice for P F and Bonus was served upon to the appellant.*
b) *Since the alleged services in the appellant case was made effective from 16/06/2005 the value of*

services provided by appellant from 01/04/2005 to 15/06/2005 and value of services toward non taxable services of STGS from 01/04/2005 to 15/05/2008 which have been made part of gross turnover should be excluded from the gross turnover.

c) The figures of gross value of services as confirmed by M/s Hindalco Industries Limited was inclusive of service tax amounting to Rs 12,88,132.00 should be excluded from the gross turnover.

d) It was submitted by the appellant that penalty under section 76 and 78 is not impossible simultaneously as both are mutually exclusive.

e) It was further submitted that penalty under section 75A of the Act was omitted from 10/09/2004 without any saving clause. The present SCN has been issued after omission of said section. Hence no penalty can be imposed under this section.

f) It has been requested that section 80 of the act provides that no penalty shall be imposed on the appellant for any failure referred to in section 76, 77 or 78 of the Act, if the assessee proves that there was reasonable cause for the said failure.

Ground of Appeal

1. *Thus the authority below has not gone through the details produced before during course of proceedings in the matter of which appellant may incur an irreparable loss.*
2. *That the authority below has grossly erred in not accepting the appellant contention of excluding the value of services prior to insertion of the services. The related services which the appellant has provided to M/s Hindalco (Service recipient) from 01.04.2005 to 15.06.2005 and 01.04.2005 to*

15.05.2008 towards STGS is excludible from the gross turnover has not been given any cognizance leading to substantial financial loss to the appellant.

3. *The Ld Joint Commissioner (Adj) Central Excise, Allahabad has without surmises and conjectures has passed the order whimsically in not accepting appellants submission to exclude quantum of service tax wrongly included in the gross turnover is bad in law and against natural justice.*
4. *The authority below has ignored his own department's verification report and prejudicially passed an erroneous order which is verifiable from your records, failing which the appellant will not be able to get true justice.*
5. *…*
6. *That the appellant be given an opportunity of personal hearing in the matter before passing an order."*

4.7 The relevant extract of the show cause notice is reproduced below:

> *"Whereas from the details provided by the M/s Hindalco Ind Ltd., it appears that the party have received a total of Rs 1,16,40,263/- as gross value of taxable services against services provided to M/s Hindalco Industries Ltd., Renukoot during the period 2005-06 to 2009-10 as detailed in Annexure "B" without taking any service tax registration in due time, without payment of applicable Service tax and suppressing these vital facts from the department with clear cut motive and intent to evade payment of service tax. A demand cum show cause notice fro recovery of service tax involved on the amount of Provident Fund and Bonus received by them, if any, which is included in in above gross value has already been issued separately. Thus service tax on remaining amount of gross value of Rs 1,12,63,799/- remains recoverable from the*

party. Service tax involved on this remaining gross value comes to the tune of Rs. 12,88,132/- (Service tax Rs 11,56,872/- + Education Cess Rs 25,137/- + Secondary & Higher Education Cess Rs 6123/-) for the period as detailed in Annexure 'B' to this notice, to the credit of Central Government, thereby contravening the provisions of Section 68 of the Act read with Rule 6 of the Rules. By doing so they have made themselves liable to penalty under Section 76 of the Act.

Whereas the party have not get themselves registered under Section 69 of the Finance Act, 1994 in due time. Scrutiny of the records available in the office of the …..revealed that the party have not … returns as detailed in Annexure A. after registration the party have filed ST-3 return but they have suppressed the gross value of services. Thus partyu have suppressed material facts from the department (1) by not getting registered in due time (2) by not filing ST-3 returns in due time after providing taxable service and (3) by way of not showing the correct amount of gross taxable value received from the service receiver and not paying due service atx. The party have never disclosed these facts to the department in their Statutory return ST-3 or otherwise, thereby suppressing the material facts regarding taxable value with intent to evade payment of Service Tax. These facts came to the knowledge of department only after getting information in this regard from M/s Hinadalco Industries Ltd., Renukoot on specific query. Thus the provisions as contained in proviso to section 73 (1) is invokable and the demand is extended for the period of last five years. By doing so, they have also made themselves liable for penalty under Section 78 of the Act.

Annexure B

Period	*Gross Value given by HI*	*Amount of PF and Bonus*	*Amount of service tax in*	*Gross value as shown*	*Amount on which service tax has*	*Due service tax to be paid*		
						S Tax	*E*	*S & Hed.*

		for which demand already has been raised	*gross value*	*by party*	*not been paid*		*Cess*	*Cess*
2005-06	*3218244*	*47842*	*0*	*0*	*3170402*	*317040*	*6341*	*0*
2006-07	*2845991*	*116923*	*0*	*0*	*2729068*	*327488*	*6550*	*0*
2007-08	*2170142*	*89039*	*0*	*0*	*2081103*	*249732*	*4995*	*2497*
2008-09	*1781340*	*66899*	*0*	*0*	*1714441*	*205733*	*4115*	*2057*
2009-10	*1624546*	*55761*	*0*	*0*	*1568785*	*156879*	*3138*	*1569*
Total	*11640263*	*376464*	*0*	*0*	*11263799*	*1256872*	*25137*	*6123”*

4.8 We find from the above that the demand has been made in the present case, on a taxable value of Rs 1,12,63,799/- after allowing the deduction from the Gross Value towards the Provident Fund and Bonus. Appellant has claimed deduction on account of the threshold exemption of Rs 4 lakhs, without establishing that the same is admissible to them by providing the details of their turnover for the past year etc. Hence the same is also not admissible to them. Thus deductions claimed on this account to would not be admissible to them. In the chart submitted by the appellant they have claimed a deduction of Rs 11,353.82/- towards the service tax amount included in the gross value. The said deduction is quite minor and revenue should have allowed the same while computing the demand of service tax.

4.9 The major deduction which has been claimed by the appellant from the gross value of taxable services is on the account of services provided by them before the same became taxable, specifically the services under the category of Supply of Tangible Good services. These service became taxable with effect from 16.05.2008. Appellant have claimed that the value of the taxable services provided by them under this category for the period prior to levy of service tax. Was about Rs 84,17,327.67. If the claim of the appellant is admitted the gross value of taxable service will be reduce substantially. Appellants had made this claim before the adjudicating authority and the first appellate authority and had submitted a chart duly certified by a Chartered Accountant, showing that the during the entire period of dispute the invoices issued by the appellant were in respect "Truck, Tractor, Dumper Hiring Charges" on some of the invoices even the registration number of vehicle was also mentioned. Both the authorities have ignored the said submission of the appellant and have proceeded to adjudicate the matter on the basis of the information received by the revenue from M/s Hindalco Industries Ltd., assuming that the services provided by the appellant were falling under the category of taxable service without even speaking a word about the classification of service. Undisputedly the entire period is before 01.07.2012, when service tax was leviable on the services which were specified as taxable service. The coverage of the services under the category of taxable service was gradually widened, every year. Appellants have claimed that the major chunk of the services provided by them were within this category and specified as taxable service only from 16.05.2008. **As no finding has been rendered by the adjudicating authority or the first appellate authority on this aspect, while adjudicating the case, the matter needs to be remanded back to the original authority for recording specific findings on this issue.**

4.10 Apart from raising the issue of determination of the taxable value for making the demand, appellant has before the adjudicating authority accepted his liability towards the payment of service tax on the re-determined value as per the chart submitted. Thus in respect of the value other than the value of Rs 84,17,327.67 for which we are remanding the matter to the original authority the demand needs to be upheld.

4.11 Appellant has before the adjudicating authority, pleaded ignorance of law, and had claimed waiver from penalty. Acting on the submissions made by the appellant, adjudicating authority has noting the fact that appellant is un-educated and out of ignorance failed to pay the service tax, extended the benefit of Section 80 of the Finance Act, 1994 and did not imposed any penalty on the appellant under Section 76, 77 & 78 as were proposed in the show cause notice.

4.12 In case of Systems & Components Pvt. Ltd [2004 (165) E.L.T. 136 (S.C.)] Hon'ble Supreme Court has held as follows:

> ***5. ....****. Once it is an admitted position by the party itself, that these are parts of a Chilling Plant and the concerned party does not even dispute that they have no independent use there is no need for the Department to prove the same. It is a basic and settled law that what is admitted need not be proved."*

This decision was relied upon by the Delhi Bench in the case of Sodagar Knitwears [2018 (362) E.L.T. 819 (Tri. - Del.)] which has been affirmed by the Hon'ble Apex Court as reported at [2018 (362) E.L.T. A213 (S.C.)].

4.13 In case of ITC Ltd. [2004 (177) ELT 433 (SC)] Hon'ble Apex Court observed as follows:

> *"18. Doubtless, the principle of res judicata is a fundamental doctrine of law that there must be an end to litigation. [See Daryao v. The State of U.P. 1962 (1) SCR 574] but the plea of res judicata has to be specifically and expressly raised. [See : Medapati Surayya v. Tondapu Bala Gangadhara Ramakrishna Reddi - AIR (35) 1948 PC 3, 7]. This view has been recently reiterated in V. Rajeshwari v. T.C. Saravanabava - 2003 (10) Scale 768, where it is said that the foundation of the plea of res judicata must be laid in the pleadings. If this was not done, no party would be permitted to raise it for the first time at the stage of the appeal. The only exception to this requirement is when the issue of res judicata is in fact argued before the lower Court. In this case not only had the plea not been taken by the Revenue at any stage before any of the authorities, but arguments exactly to the contrary had been put*

forward by the respondent. We will not permit the plea to be raised now. ….”

4.14 The arguments being advanced by the appellant in the present appeal were foreclosed in terms of the submissions made by the appellant before the Adjudicating authority. Acting on the submissions made by the appellant adjudicating authority has not imposed any penalty. Raising these arguments for the first time in subsequent proceedings will be hit by the principles of Res-judicata. In case of M. Nagabhushana [2011 (271) E.L.T. 481 (S.C.)] Hon'ble Apex Court observed a s follows:

“13. It is obvious that such a litigative adventure by the present appellant is clearly against the principles of Res Judicata as well as principles of Constructive Res Judicata and principles analogous thereto.

14. The principles of Res Judicata are of universal application as it is based on two age old principles, namely, 'interest reipublicae ut sit finis litium' which means that it is in the interest of the State that there should be an end to litigation and the other principle is 'nemo debet his ve ari, si constet curiae quod sit pro un aet eademn cause' meaning thereby that no one ought to be vexed twice in a litigation if it appears to the Court that it is for one and the same cause. This doctrine of Res Judicata is common to all civilized system of jurisprudence to the extent that a judgment after a proper trial by a Court of competent jurisdiction should be regarded as final and conclusive determination of the questions litigated and should forever set the controversy at rest.

15. That principle of finality of litigation is based on high principle of public policy. In the absence of such a principle great oppression might result under the colour and pretence of law in as much as there will be no end of litigation and a rich and malicious litigant will succeed in infinitely vexing his opponent by repetitive suits and actions. This may compel the weaker party to relinquish *his right. The doctrine of Res Judicata has been evolved to prevent such an anarchy. That is why it is perceived that the plea of Res Judicata is not a technical doctrine but a fundamental principle which sustains the Rule of Law in ensuring finality in litigation. This principle seeks to promote honesty and a fair administration of justice and to prevent abuse in the matter of accessing Court for agitating on issues which have become final between the parties .*

16. Justice Tek Chand delivering the unanimous Full Bench decision in the case of Mussanunat Lachhmi v. Mussammat Bhulli (ILR Lahore Vol. VIII 384) traced the history of this doctrine both in Hindu and Mohammedan jurisprudence as follows :-

"In the Mitakshra (Book II, Chap. I, Section V, verse 5) one of the four kinds of effective answers to a suit is "a plea by former judgment" and in verse 10, Katyayana is quoted as laying down that "one against whom a judgment had formerly been given, if he bring forward the matter again, must be answered by a plea of Purva Nyaya or former judgment" (Macnaughten and Colebrooke's translation, page 22). The doctrine, however, seems to have been recognized much earlier in Hindu Jurisprudence, judging from the fact that both the Smriti Chandrika (Mysore Edition, pages 97-98) and the Virmitrodaya (Vidya-Sagar Edition, page 77) base the defence of Prang Nyaya (former decision) on the following text of the ancient law-giver Harita, who is believed by some Orientalists to have flourished in the 9th Century B.C. and whose Smriti is now extant only in fragments :-

"The plaintiff should be non--suited if the defendant avers : 'in this very affair, there was litigation between him and myself previously,' and it is found that the plaintiff had lost his case".

There are texts of Prasara (Bengal Asiatic Society Edition, page 56) and of the Mayukha (Kane's Edition, page 15) to the same effect.

Among Muhammadan law-givers similar effect was given to the plea of "Niza-i-munfasla" or "Amar Mania taqrir mukhalif." Under Roman Law, as administered by the Proetors' Courts, a defendant could repel the plaintiff's claim by means of 'exceptio rei judicatoe" or plea of former judgment. The subject received considerable attention at the hands of Roman jurists and as stated in Roby's Roman Private Law (Vol. II, page 338) the general principle recognised was that "one suit and one decision was enough for any single dispute" and that "a matter once brought to trial should not be tried except, of course, by way of appeal".

(Page 391-392 of the report)

17. The learned Judge also noted that in British India the rule of Res Judicata was first introduced by Section 16 of the Bengal Regulation, III of 1973 which prohibited the Zilla and City Courts from entertaining any cause which, from the production of a former decree or the record of the Court, appears to have been heard and determined by any Judge or any Superintendent of a Court having competent jurisdiction. The learned Judge found that the earliest legislative attempt at codification of the law on the subject was made in 1859, when the first Civil Procedure Code was enacted, whereunder Section 2 of the Code barred every Court from taking cognizance of suits which, on the same cause of action, have been heard and determined by a Court of competent jurisdiction. The learned Judge opined, and in our view rightly, that this was partial recognition of the English rule in so far as it embodied the principles relating to Estoppel by judgment or Estoppel by record.

18. Thereafter, when the Code was again revised in 1877, the operation of the rule was extended in Section 13 and the bar was no longer confined to the retrial of a dispute relating to the same cause of action but the prohibition was extended against reagitating an issue, which had been heard and finally decided between the same parties in a former suit by a competent court. The learned Judge also noted that before the principle assumed its present form in Section 11 of the Code of 1908, the Section was expanded twice. However, the learned Judge noted that Section 11 is not exhaustive of the law on the subject.

19. It is nobody's case that the appellant did not know the contents of FWA. From this it follows that it was open to the appellant to question, in the previous proceeding filed by it, that his land which was acquired was not included in the FWA. No reasonable explanation was offered by the appellant to indicate why he had not raised this issue. Therefore, in our judgment, such an issue cannot be raised in this proceeding in view of the doctrine of Constructive Res Judicata.

20. It may be noted in this context that while applying the principles of Res Judicata the Court should not be hampered by any technical rules of interpretation. It has been very categorically opined by Sir Lawrence Jenkins that "the application of the rule by Courts in India should be influenced by no technical considerations of form but by matter of substance within the limits allowed by law". [See Sheoparsan Singh v. Rammanandan Prasad Singh, (1916) 1 I.L.R. 43 Cal. 694 at page 706 (P.C.)].

21. Therefore, any proceeding which has been initiated in breach of the principle of Res Judicata is prima-facie a proceeding which has been initiated in abuse of the process of Court.

22. A Constitution Bench of this Court in Devilal Modi v. Sales Tax Officer, Ratlam & Ors. - AIR 1965 SC 1150, has explained this principle in very clear terms :

"But the question as to whether a citizen should be allowed to challenge the validity of the same order by successive petitions under Art. 226 cannot be answered merely in the light of the significance and importance of the citizens' fundamental rights. The general principle underlying the doctrine of res judicata is ultimately based on considerations of public policy. One important consideration of public policy is that the decisions pronounced by courts of competent jurisdiction should be final, unless they are modified or reversed by appellate authorities; and the other principle is that no one should be made to face the same kind of litigation twice over, because such a process would be contrary to considerations of fair play and justice, vide : Daryao v. State of U.P., 1962-1 SCR 575; (AIR 1961 SC 1457)."

23. This Court in All India Manufacturers Organisation (supra) explained in clear terms that principle behind the doctrine of Res Judicata is to prevent an abuse of the process of Court.

24. In explaining the said principle the Bench in All India Manufacturers Organisation (supra) relied on the following formulation of Lord Justice Somervell in Greenhalgh v. Mallard - (1947) 2 All ER 255 (CA) :

"I think that on the authorities to which I will refer it would be accurate to say that res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but that it covers issues or facts which are so clearly part of the subject-matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."

25. The Bench also noted that the judgment of the Court of Appeal in "Greenhalgh" was approved by this Court in State of U.P. v. Nawab Hussain - (1977) 2 SCC 806 at page 809, para 4.

26. Following all these principles a Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra - (1990) 2 SCC 715 laid down the following principle :

"…………..an adjudication is conclusive and final not only as to the actual matter determined but as to every other matter which the parties might and ought to have litigated and have had decided as incidental to or essentially connected with subject matter of the litigation and every matter coming into the legitimate purview of the original action both in respect of the matters of claim and defence. Thus, the principle of constructive res judicata underlying Explanation IV of Section 11 of the Code of Civil Procedure was applied to writ case. We, accordingly hold that the writ case is fit to be dismissed on the ground of res judicata."

27. In view of such authoritative pronouncement of the Constitution Bench of this Court, there can be no doubt that the principles of Constructive Res Judicata, as explained in explanation IV to Section 11 of the CPC, are also applicable to writ petitions."

4.15 Hon'ble Supreme Court has in the case of M J exports [2015 (325) E.L.T. 216 (S.C.)] held as follows:

"11. Mr. K. Radhakrishnan, learned senior counsel appearing for the Department, has drawn our attention to the Order dated 2-8-2004 which was passed in Writ Petition No. 1278 of 2004. His submission was that in the earlier round of litigation before the High Court when the demand of interest was questioned, it was given up inasmuch as after arguments on this issue, the counsel for the appellant had withdrawn the writ petition. At that time, while allowing the appellant to withdraw the writ petition,

the dispute was confined only to the calculation of interest as is clear form the order dated 2-8-2004 itself which specifically referred to the averments made in Paragraphs 6 and 7. These paragraphs have already been extracted above. In Paragraph 6 particularly, Respondent No. 1 made some remarks about the calculation of the interest and had stated that it needed re-calculation. Therefore, after the dismissal of the said writ petition as withdrawn, the only issue that remains for consideration was how much interest is payable and the correct calculations thereof. It is a matter of record which flows from the correspondence exchanged thereafter between the parties that insofar as Department is concerned, it only re-worked the amount of interest and demanded interest in the sum of Rs. 4,67,02,251/- after reducing the figure from 8,43,62,504/- because of the reasons already stated above.

12. Consequently in the second writ petition, when the appellant as well as its counsel knew that the issue as to whether the interest is payable or not on other grounds had already been foreclosed in the earlier writ petition, the counsel for the appellant did not make any submission with regard to the aforesaid plea raising the issue in Show Cause Notice and limited his prayer from the date from which the interest was to be paid.

13. In these circumstances, we feel that when this issue was raised and abandoned in the first writ petition which was dismissed as withdrawn, the principles of constructive res judicata which is laid down under Order 23 Rule 1 of the Code of Civil Procedure, 1908, and which principles are extendable to writ proceedings as well as held by this Court in 'Sarguja Transport Service v. State Transport Appellate Tribunal, M.P., Gwalior and Others' [1987 (1) SCR 200] would squarely be applicable."

4.16 In view of discussions as above we are not inclined to consider the other points raised by the appellant in this appeal before us which are contrary to the submissions made by the appellant before the adjudicating authority and the first appellate authority or were never pleaded earlier.

4.17 Thus in view of the discussions of above we remand the matter back to the original authority for reconsideration of the issue to the extent of allowing deduction of Rs. 84,17,327.67/- which appellant claim were received by them against the services of "Supply of Tangible Goods service" prior to 16.05.2008, the date from which the service was made taxable.

5.1 Appeal is partly allowed to the extent of remanding the matter to original authority to the extent indicated in para 4.17 above.

5.2 As the matter is quite old adjudicating authority should in de novo proceedings adjudicate the matter within three months from the date of receipt of this order, following the principles of natural justice.

(Pronounced in open court on-22 April, 2024)

Sd/-
(P.K. CHOUDHARY)
MEMBER (JUDICIAL)

Sd/-
(SANJIV SRIVASTAVA)
MEMBER (TECHNICAL)

akp